DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-5443	
Title:	Charles Andrew Fowler, aka Man, Petitioner v. United States
Docketed:	July 16, 2010
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Nos.:	(08-15463)
Decision Date:	April 14, 2010

Questions Presented

---Date---	--------Proceedings and Orders---------------------
Jul 13 2010	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 16, 2010)
Jul 21 2010	Waiver of right of respondent United States to respond filed.
Jul 29 2010	DISTRIBUTED for Conference of September 27, 2010.
Aug 16 2010	Response Requested. (Due September 15, 2010)
Sep 8 2010	Order extending time to file response to petition to and including October 15, 2010.
Oct 14 2010	Brief of respondent United States in opposition filed.
Oct 27 2010	Reply of petitioner Charles Andrew Fowler, aka Man filed. (Distributed)
Oct 28 2010	DISTRIBUTED for Conference of November 12, 2010.
Nov 15 2010	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Dec 8 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including January 12, 2011.
Dec 8 2010	The time within which to file respondent's brief on the merits is extended to and including February 25, 2011.
Dec 23 2010	SET FOR ARGUMENT ON Tuesday, March 29, 2011.
Jan 12 2011	Joint appendix filed. (Statement of costs filed)
Jan 12 2011	Brief of petitioner Charles Andrew Fowler, aka Man filed.
Jan 25 2011	CIRCULATED.
Feb 17 2011	Record received from U.S.D.C. for Middle District of Florida. (1 box)
Feb 23 2011	Record received from U.S.C.A. for 11th Circuit. (1 envelope)
Feb 25 2011	Brief of respondent United States filed. (Distributed)
Mar 21 2011	Reply of petitioner Charles Andrew Fowler, aka Man filed. (Distributed)
Mar 21 2011	Motion to appoint counsel filed by petitioner Charles Andrew Fowler, aka Man.

Mar 29 2011 Argued For petitioner Stephen M Crawford Tampa Fla For respondent Sarah E Harrington Assistant to the Solicitor General Department of Justice Washington D C

PETITION
FOR
WRIT OF
CERTIORARI

NO. 10 - 10-5443 **ORIGINAL**

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2010

CHARLES FOWLER,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

Supreme Court, U.S.
FILED
JUL 13 2010
OFFICE OF THE CLERK

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

The Petitioner, Charles Fowler, moves pursuant to Supreme Court Rule 39 for leave to proceed in forma pauperis and represents the following in support thereof:

1. The Petitioner seeks certiorari review of a judgment entered by the United States Court of Appeals for the Eleventh Circuit on April 14, 2010, in the case of United States v. Charles Fowler, Case No. 08-154643 - E.

2. The Petitioner cannot afford the expenses associated with the present proceeding. The Petitioner has been incarcerated at all times since 2007. The Petitioner currently is in the custody of the Federal Bureau of Prisons and is incarcerated at the United States Penitentiary in Coleman, Florida.

3. The Petitioner was allowed to proceed in forma pauperis in the U.S. District Court and the Eleventh Circuit.

4. The undersigned served as appointed appellate counsel under 18 U.S.C. §3006A while the case was before the Eleventh Circuit. Previously, Stephen Crawford of Tampa served as the Petitioner's appointed counsel under 18 U.S.C. §3006A in the District Court.

WHEREFORE, Charles Fowler respectfully requests that the United States Supreme Court grant this Motion and permit him to proceed in forma pauperis.

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Attorney for Petitioner, Charles Fowler

10-5443

NO. 10 -

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vs.

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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a defendant may be convicted of murder under 18 U.S.C. §1512(a)(1)(C) without proof that information regarding a possible Federal crime would have been transferred from the victim to Federal law enforcement officers or judges.

PARTIES TO THE CASE

The only parties to this case are the Government and the Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Charles Fowler, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit in United States v. Charles Fowler, Case No. 08-15463 - E.

OPINION BELOW

The Eleventh Circuit affirmed the judgment of the District Court in a published opinion on April 14, 2010. The opinion is attached hereto as Appendix A.

SUPREME COURT JURISDICTION

The Eleventh Circuit's decision was filed on April 14, 2010. The Petitioner is filing the instant Petition for Certiorari within 90 days of the Eleventh Circuit's decision. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. s. 1254(1) and Supreme Court Rule 13.1.

RELEVANT STATUTORY PROVISION

Section 1512 of Title 18, United States Code, is titled, "Tampering with a witness, victim, or an informant." Subsection (a)(1)(C)provides:

> (a)(1) Whoever kills or attempts to kill another person, with intent to —
>
> (C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;
>
> shall be punished as provided in paragraph (3).

STATEMENT OF THE CASE

Basis of Federal Jurisdiction in the First Instance – The United States District Court had subject matter jurisdiction of this Federal criminal case pursuant to 18 U.S.C. §3231. Section 3231 confers original jurisdiction upon District Courts over all offenses against the laws of the United States.

A two-count Indictment against Fowler alleged offenses against two laws of the United States. Count 1 alleged a violation of 18 U.S.C. §1512(a)(1)(C), and Count 2 alleged a violation of 18 U.S.C. §924(c)(1)(A). These charges gave jurisdiction to the District Court pursuant to 18 U.S.C. §3231.

Statement of Facts –

Proceedings in the District Court — On September 19, 2007, a Grand Jury in the Middle District of Florida indicted Fowler on two counts. See Indictment, Doc. 1. (Note: The record references identify the name and number of a specific document or trial transcript as it was entered upon the District Court docket in the case of United States v. Charles Andrew Fowler, Case No. 8:07-CR-380-T-30TGW).

The first count charged Fowler with murdering a police officer in violation of 18 U.S.C. s. 1512(a)(1)(C) on March 3, 1998. The Indictment alleged that Fowler shot Officer Christopher Horner of the Haines City Police Department in the head and that he did so with the intent to prevent the officer from communicating with a law enforcement officer or judge of the United States about the commission or possible commission of a Federal offense.

The Indictment listed a total of six Federal offenses that allegedly motivated Fowler to kill Officer Horner — first, that associates of Fowler had violated 18 U.S.C. s. 1951 by committing an armed robbery of a Holiday Inn in Dundee, Florida, earlier in the morning of March 3, 1998; second, that Fowler and others were conspiring to rob a bank later in the morning of March 3, 1998, in violation of 18 U.S.C. ss. 2113 and 371; third, that Fowler and others were conspiring to rob the bank in violation of 18 U.S.C. s. 1951; fourth, that Fowler previously had been convicted of a crime punishable by imprisonment for a term exceeding one year and was in knowing possession of a firearm that had been transported in interstate commerce in violation of 18 U.S.C. s. 922(g); fifth, that Fowler and others were in knowing and intentional possession of cocaine in violation of 21 U.S.C. s. 844(a); and sixth, that Fowler and others were in knowing and intentional possession of marijuana in violation of 21 U.S.C. s. 844(a). Indictment, Doc. 1, pages 1 - 2.

Count 2 of the indictment charged Fowler with a violation of 18 U.S.C. s. 924(c)(1)(A) for knowingly using and carrying a firearm in relation to a crime of violence for which he may be prosecuted in a court of the United States. The underlying crimes of violence were the alleged conspiracies to commit robbery in violation of 18 U.S.C. s. 1951 and to commit bank robbery in violation of 18 U.S.C.

ss. 2113 and 371. Indictment, Doc. 1, pages 2 - 3.

Count 2 further alleged that while in the course of using and carrying the firearm, Fowler committed murder of Officer Horner as defined in 18 U.S.C. s. 1111. Indictment, Doc. 1, page 3.

Fowler entered not guilty pleas to both counts and was tried by a jury from June 9 to 17, 2008. District Court Judge James Moody presided. Fowler moved for a judgment of acquittal at the close of the Government's case in chief. The District Court denied the motion. See Transcript of June 12, Doc. 99, page 224.

The jury found Fowler guilty of both counts on June 17, and sentencing took place on September 18, 2008. The District Court imposed a mandatory life sentence on Count 1 and a consecutive 10-year sentence on Count 2. Final judgment was entered on September 19, and Fowler filed his Notice of Appeal on September 22. See Docs. 73, 75, 82, 84, and 85.

Fowler is incarcerated. He is serving his Federal sentence at the United States Penitentiary in Coleman, Florida.

Statement Regarding the Offense —

Christopher Horner died of a single gunshot wound to his head on March 3, 1998. At the time of his death, Officer Horner was a patrolman with the Haines City Police Department. See Testimony of Peggy Hawkins, former dispatcher for Haines City Police Department, June 9, 2008, Doc. 90, pages 39, 41; Dr. Stephen Nelson, Chief Medical Examiner of Tenth Judicial Circuit, June 12, Doc. 99, page 114.

Officer Horner had started work at 6:00 a.m. and already had begun the day's patrol duties in his police car. One of the locations in Officer Horner's zone was the Oakland Cemetery. The cemetery served as a dumping ground where car thieves often abandoned stolen vehicles. See Hawkins testimony, Doc. 90, pages 41-43; Testimony of Polk County Deputy Sheriff Brian Steinc, June 10, Doc. 93, page 44.

At 6:38 a.m., Officer Horner notified the police dispatcher that he was at the Oakland Cemetery and was getting out of his car to investigate a suspicious vehicle without a visible license tag on it. Officer Horner stated that the suspicious vehicle might have been a Crown Victoria. That message was the last time anyone ever heard from Officer Horner. See Hawkins testimony, Doc. 90, pages 47, 49, 54.

Almost ten minutes went by without further communication from Officer Horner. His silence prompted the shift supervisor, Sgt. Sandra Spicer, to drive to the Oakland Cemetery to investigate. At 7:00 a.m., Sgt. Spicer radioed back to the police station with the grim news that Officer Horner was down. See Hawkins testimony, Doc. 90, pages 49 - 52.

Other law enforcement officers and emergency medical units rushed to the Oakland Cemetery and determined that Officer Horner was dead. See Testimony of Emergency Medical Technician Dennis Farmer, June 10, Doc. 93, pages 26, 31. He was lying face down, and his service weapon was underneath his body. The bullet had entered the back left side of Officer Horner's head and exited on the right side. See Testimony of Dr. Stephen Nelson, Chief Medical Examiner of Tenth Judicial Circuit, Doc. 99, page 120, 122.

The Polk County Sheriff's Office ("Sheriff's Office") took control of the investigation into Officer Horner's death. Homicide Detective Deanna Pry initially was assigned to lead the investigation, but she was removed from her position of authority within a week because she was angry that other personnel in the Sheriff's Office refused even to consider whether Officer Horner had committed suicide. The possibility of suicide rather than a homicide had been debated among Sheriff's Office personnel and had created a feud. See Testimony of Deanna Pry, June 13, Doc. 95, pages 36, 40, 55, 56, 58, 60.

Officer Horner's death remained unsolved until the spring of 2002. By then, the lead investigator on the case was Det. Louis Giampavolo, a member of the homicide division's cold case unit. See Testimony of Det. Giampavolo, June 12, Doc. 99, pages 169, 172-174.

As part of his investigation, Det. Giampavolo reviewed criminal activity that occurred near the time of Officer Horner's death on the morning of March 3, 1998. His inquiry led him to a report about an armed robbery that occurred at a Holiday

Inn in Dundee, Florida early in the morning of March 3, 1998. See Testimony of Det. Giampavolo, June 12, Doc. 99, pages 169, 170.

Det. Giampavolo learned from other personnel in the Sheriff's Office that Christopher Gamble, a Florida state prison inmate then serving a 20-year sentence for an armed robbery in 1999, was confessing to numerous armed robberies in the state. See Testimony of Det. Giampavolo, June 12, Doc. 99, pages 172; Testimony of Christopher Gamble, June 11, Doc. 97, pages 155, 158, 169.

The possibility that Gamble might have information relevant to the investigation into Officer Horner's death resulted in a series of meetings between Det. Giampavolo and Gamble beginning on March 8, 2002. Eventually, Gamble began to cooperate in the investigation of Officer Horner's death. His accounts were not always completely truthful, and he even lied to a Federal Grand Jury in early 2003. Det. Giampavolo nevertheless insisted that Gamble adhered to the same version ever since his second Grand Jury appearance on February 6, 2003, and always has accused Fowler of being the person who shot and killed Officer Horner with the officer's own handgun. See Testimony of Det. Giampavolo, June 12, Doc. 99, pages 179, 183.

Gamble, who lived in Haines City as of March, 1998, testified that Fowler shot Officer Horner. According to Gamble, the events of March 3, 1998, began with the theft of a Buick Regal. Gamble and two friends, Jeffrey Bouiye and Andre Paige, stole the car and used it in the armed robbery of the Dundee Holiday Inn. See Gamble's testimony, Doc. 97, pages 86-90.

Gamble and Bouiye stormed into the lobby of the Holiday Inn while Paige waited outside in the stolen car. Gamble fired a shot into the ceiling; vaulted over the counter in the lobby; pointed his weapon at the head of the hotel employee, David Joseph; and made off with approximately $1,000 to $1,200. See Gamble's testimony, Doc. 97, pages 90-93; Testimony of David Joseph, June 9, Doc. 90, page 14.

According to Gamble, he and his two confederates then returned to Haines City and went to various nightspots located on Eleventh Street. Gamble claimed that he, Bouiye and Paige had decided to rob a bank later that morning and were patrolling Eleventh Street to find other people to join them in the robbery. See Gamble's testimony, Doc. 97, page 95.

Gamble and his two friends happened to meet up with Fowler and Robert Winston. Fowler and Winston agreed to participate in the bank robbery, and the five men drove out to the bank on Route 27 to conduct surveillance. According to Gamble, they rode in a brown Oldsmobile that Fowler and Winston had stolen earlier that evening. See Gamble's testimony, Doc. 97, pages 95, 99.

The five men returned to Haines City once again; gathered weapons and clothing that they planned to use in the impending robbery; and drove in the brown Oldsmobile to the Oakland Cemetery to plan the bank heist, consume cocaine and marijuana, and listen to music. See Gamble's testimony, Doc. 97, pages 100, 104, 106.

Gamble testified that Fowler got out of the car and walked off by himself to a grove of trees. While Fowler was away from the brown Oldsmobile, Officer Horner drove into the cemetery. Officer Horner turned on the spotlight of his patrol car, and exited from his vehicle. Officer Horner had his pistol in one hand and a flashlight in the other. See Gamble's testimony, Doc. 97, pages 108-110.

Officer Horner ordered the occupants of the Oldsmobile to get out of their car. Bouiye remained in the car while Gamble, Winston and Paige exited. At that point, Fowler returned to the Oldsmobile. Fowler attacked Officer Horner from behind and attempted to grab his pistol from him. Gamble, Winston, and Paige joined in the struggle to wrest control of the gun from Officer Horner. See Gamble's testimony, Doc. 97, pages 129, 131-132.

Gamble claimed that Office Horner surrendered his weapon to Fowler. Fowler ordered Officer Horner to get down on his knees. Gamble testified that he did not want any harm to come to Officer Horner, and he asked Fowler to hand the gun to him. Bouiye, however, yelled at Fowler from inside the Oldsmobile to shoot the "cracker," and Fowler fired one shot into Officer Horner's head. See Gamble's testimony, Doc. 97, pages 132-133, 137.

Gamble testified that he took Officer Horner's gun from Fowler and placed it underneath the officer's body. The five men left the Oakland Cemetery and never carried out the bank robbery that they had planned to commit later that morning. Gamble testified that he became angry over the fact that Officer Horner's death meant that the planned bank robbery never took place. See Gamble's testimony, Doc. 97, pages 140, 147.

Dr. Stephen Nelson, the Chief Medical Examiner of Florida's Tenth Judicial Circuit, testified that Officer Horner's death was a homicide. See Testimony of Dr. Nelson, June 12, Doc. 99, page 121. Dr. Nelson offered four reasons for his conclusion.

First, Dr. Nelson stated that most firearm suicides are accomplished with the gun in the person's mouth, at the temple, under the chin, or over the heart. In contrast, Officer Horner's entrance wound was in the back left side of his head. See Testimony of Dr. Nelson, Doc. 99, page 120, 122.

Second, the muzzle of the gun was a couple of inches from Officer Horner's head when the shot was fired. In contrast, people who commit suicide typically hold the weapon so that the muzzle is in direct contact with the body part. See Testimony of Dr. Nelson, Doc. 99, pages 123, 131.

Third, Dr. Nelson acknowledged that suicides often are committed in cemeteries. However, he offered the rather remarkable opinion that although

Officer Horner's death did occur in a cemetery. Officer Horner was white and would not have been likely to choose a cemetery such as Oakland where African-Americans are buried. See Testimony of Dr. Nelson, Doc. 99, page 123.

Finally, Officer Horner was wearing a bulletproof vest at the time of his death. In Dr. Nelson's view, a bulletproof vest is atypical of a suicide. See Testimony of Dr. Nelson, Doc. 99, page 124.

On cross-examination, Dr. Nelson acknowledged that he was aware that Officer Horner was beset with financial and marital problems at the time of his death and ever had confided to a female employee at the Police Department that he seriously considered taking his own life. See Testimony of Dr. Nelson, Doc. 99, page 128.

The jury convicted Fowler on both counts of the Indictment on June 17, 2008. Sentencing took place on September 18, 2008. The District Court imposed a mandatory life sentence for the murder conviction under §1512(a)(1)(C) and a consecutive 10 - year sentence for the firearm conviction under §924(c)(1)(A). Fowler then appealed to the Eleventh Circuit.

Proceedings in the Eleventh Circuit — Fowler argued on appeal that the Government had presented insufficient evidence of a violation of §1512(a)(1)(C). Fowler asserted that the Government failed to prove that information about a possible Federal crime would have been communicated to Federal law enforcement officers if the murder had not occurred.

Fowler relied principally on two Eleventh Circuit decisions -- United States v. Veal, 153 F.3d 1233 (11th Cir. 1998), and United States v. Ronda, 455 F.3d 1273 (11th Cir. 2006). Veal and Ronda had interpreted and applied §1512(b)(3), a provision with language very similar to the text of §1512(a)(1)(C). Subsection 1512(b)(3), like §1512(a)(1)(C), prohibits conduct which is motivated by an intent to "... prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole or release pending judicial proceedings..."

The Eleventh Circuit rejected Fowler's argument in its published decision of April 14, 2010. The Eleventh Circuit stated that Fowler improperly focused on the victim's state of mind instead of the defendant's. The Eleventh Circuit provided the following explanation:

> In relevant part, 18 U.S.C. §§ 1512(a)(1)(C) provides that it is a federal criminal offense to "kill[] . . . another person, with intent to . . . prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . . ."
>
> Thus, for the government to prove a violation of §§ 1512(a)(1)(C) it must show: (1) the defendant knowingly and willfully killed a person; and (2) the defendant killed the person with the intent to prevent the communication of information "relating to the commission or possible commission of a [f]ederal . . . offense . . . ." 18 U.S.C. §§ 1512(a)(1)(C).

> There is no question that Fowler killed Officer Horner with the intent to prevent his further investigation and discovery of the group's criminal activities. Fowler argues, however, that no evidence was presented either that: (1) it was likely that there would be a federal investigation of any of the federal crimes involving Fowler and his group; or (2) it was likely that the information Officer Horner might have obtained would have been transferred to a federal officer or federal judge by Officer Horner. Thus, Fowler contends the government failed to prove the federal nexus to the murder, which is an essential element of a violation of §§ 1512(a)(1)(C). Fowler misperceives the requirements of the statute.
>
> Nothing in §1512(a)(1)(C) requires proof that a federal investigation is ongoing, imminent, or likely. To the contrary, the statute explicitly provides that the murder must have been intended to prevent communication relating to the "possible commission" of a federal offense. Id. (emphasis added). Fowler's sufficiency argument is based on his incorrect assertion that the federal nexus required by §§ 1512(a)(1)(C) requires proof that the victim would have likely communicated information relating to the possible commission of a federal offense to federal authorities. In construing the statute this way, Fowler focuses on the victim's state of mind instead of, as the statute requires, the defendant's state of mind. His approach has been rejected by the majority of our sister circuits and by this court in United States v. Veal, 153 F.3d 1233, 1251-52 (11th Cir. 1998), which addressed the similarly-worded §1512(b)(3).

Appendix A, pages 5 - 7 (emphasis added).

REASONS FOR GRANTING THE WRIT

1. The Supreme Court should grant this Petition to resolve a Circuit split as to the proper meaning of §1512(a)(1)(C).

Rule 10 of the Supreme Court Rules identifies factors to be considered when passing upon a Petition for Certiorari. A conflict of decisions between Circuit Courts of Appeal is one such factor:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter ...

The Circuit Courts are divided on the meaning of §1512(a)(1)(C). The Eleventh Circuit's decision in the present case is incompatible with the Second Circuit's decision in United States v. Lopez, 372 F.3d 86 (2d Cir. 2004).

In Lopez the Second Circuit reversed Carlos Lopez's conviction under §1512(a)(1)(C) for the murder of Edward Montalvo. The Second Circuit held in Lopez that the Government failed to present sufficient evidence that the victm, Mr. Montalvo, had intended to inform Federal officials that Lopez was threatening and intimidating him. Mr. Montalvo had sought protection from local authorities, but the Second Circuit concluded that a conviction under §1512(a)(1)C) required proof that the "victim plausibly might have turned to federal officials." The Second Circuit stated:

> In the absence of the type of evidence found sufficient in *Romero* to establish the requisite federal nexus, the government contends that it was established here by evidence that Montalvo reported Lopez to the local police on more than one occasion, which resulted in his arrest for gun possession and menacing, that Lopez was motivated to kill Montalvo to prevent him from bringing police to the flower shop, and that Lopez had stipulated that his possession of firearms on the date of his arrest would have constituted a federal offense. In other words, the government contends that a federal nexus was established by proof that a federal crime was committed and that Montalvo was willing to cooperate with the local police. According to the government, nothing more is required to establish the federal nexus.
>
> We cannot agree that this evidence was sufficient to prove obstruction of justice murder in violation of section 1512(a)(1)(C). In *Diaz*, we adopted the Third Circuit's formulation of the government's burden of proof, explaining that "the government must prove that at least one of the law-enforcement-officer communications which the defendant sought to prevent would have been with a federal officer, but that the government is not obligated to prove that the defendant knew or intended anything with respect to this federal involvement.... *[T]he government may carry this burden by showing that the conduct which the defendant believed would be discussed in these communications constitutes a federal offense, so long as the government also presents 'additional appropriate evidence.'* "
>
> 176 F.3d at 91 (quoting *Bell*, 113 F.3d at 1349) (emphasis added and alteration in original). Because the government seeks to carry its burden in this case by showing that the underlying conduct to be discussed involved a federal offense, it therefore must also present "additional appropriate evidence." *Id.*
>
> Examples of "additional appropriate evidence" include proof that the defendant had "actual knowledge of the federal nature of the offense" or proof that "there was a federal investigation in progress" at the time of the murder. *United States v. Stansfield*, 101 F.3d 909, 918 & n. 4 (3d Cir.1996); *see also Bell*, 113 F.3d at 1349-51 & n. 4 (expressing no opinion as to what additional types and what quantum of evidence satisfy the "additional

appropriate evidence" standard, "which by its nature will require careful, case-by-case analysis"). In *Diaz*, for instance, we found the evidence sufficient because the defendant intended to prevent the victim from communicating with local officials about a federal offense, *and* that the defendant knew federal officials could record his telephone conversations that he conducted from federal prison with another member of his gang regarding "disciplin[ing]" the victim, *and* that during the relevant time period "federal authorities were in fact working closely with local police on a massive federal investigation of the [defendant's] gang's drug activities." 176 F.3d at 90-91. And in every other case in this or in any other circuit that has addressed this issue and affirmed a conviction there similarly has been at least some evidence of federal involvement beyond the underlying federal crime to be discussed with the federal official. *See, e.g., Romero*, 54 F.3d. at 59 ("For a number of reasons, members of Romero's organization had become suspicious that Tyson was cooperating with federal authorities."); *Gonzalez*, 922 F.2d at 1046-47, 1053-54 (involving federal offense and investigation by the federal Drug Enforcement Administration); *Bell*, 113 F.3d at 1347, 1350 (involving federal offense and investigation by task force comprised of local, state, and federal investigators); *Stansfield*, 101 F.3d at 919 (involving federal offense and federal investigation); *United States v. Leisure*, 844 F.2d 1347, 1364 (8th Cir.1988) (involving evidence that victim would "'turn over and talk to the FBI'").

Where there has been no such federal involvement, however, other courts have found the evidence insufficient. *See, e.g., United States v. Causey*, 185 F.3d 407, 422-23 (5th Cir.1999). Such cases have been, and likely will be, rare. As we have explained, after all, "the killing of an individual with the intent to frustrate the individual's *possible* cooperation with federal authorities is implicated by the statute." *Romero*, 54 F.3d at 62 (emphasis added). Yet there must be *evidence* —— not merely argument —— of such a possibility. In other words, the government must adduce evidence from which a rational juror could infer that the victim *plausibly* might have turned to federal officials.

Here, the government has adduced no such "additional appropriate evidence." All the government proved was that conduct punishable under both state and federal law was involved and that Montalvo was willing to communicate with *local* authorities. The government did show that Montalvo feared for his life after the district attorney declined to pursue more serious charges. But even after that decision, Montalvo did not turn to

> federal officials; instead, he returned to *local* authorities for a protective order. There simply is no evidence that, despite the passage of over ten days between the issuance of the protective order and his murder, Montalvo ever turned to, or gave so much as a moment's thought of turning to, federal officers, or that federal agents were otherwise involved. The government provided no evidence, for example, that a federal investigation was underway, that federal authorities were in any way involved, that Lopez knew of the federal nature of his offense at the time he murdered Montalvo, or that Montalvo intended to communicate or anticipated communicating with federal authorities. *See, e.g.,* Causey, 185 F.3d at 422-23. It is always possible that Montalvo someday "might" have turned to federal officials; but the range of things he "might" do is limitless, and no evidence in the record connects this possibility with reality. On these facts, even drawing all reasonable inferences in the government's favor, we hold that a reasonable jury could not conclude that Lopez killed Montalvo to prevent his communication to a federal law enforcement officer. Accordingly, we reverse Lopez's conviction on Count III.

Lopez, 372 F.3d at 91 - 92 (emphasis supplied).

The Second Circuit concentrated on the victim's actions in Lopez to determine whether a federal nexus had been established. Fowler had presented a similar argument to the Eleventh Circuit but to no avail.

The Second Circuit's decision in Lopez is at loggerheads with the decision in the present case. The Supreme Court should grant this Petition and decide whether §1512(a)(1)(C) and similar provisions dealing with witness intimidation and tampering require proof of the victim's intention to communicate with Federal officials.

It should be noted that the opinion in Lopez addressed only the conviction under §1512(a)(1)(C) and not other offenses for which the defendant had been convicted. The Second Circuit affirmed all other issues in a separate summary order. See 372 F.3d at 88.

CONCLUSION

For the reasons stated herein, Charles Fowler respectfully requests that his Petition for Certiorari be granted.

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-15463

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APRIL 14, 2010
JOHN LEY
CLERK

D. C. Docket No. 07-00380-CR-T-30-TGW

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES ANDREW FOWLER,
a.k.a. Man,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(April 14, 2010)

Before EDMONDSON, BARKETT and ROTH,* Circuit Judges.

BARKETT, Circuit Judge:

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* Honorable Judge Jane R. Roth, United States Circuit Judge for the Third Circuit, sitting by designation.

Charles Andrew Fowler appeals his conviction for murder with the intent to prevent a person from communicating information about a federal offense to a federal law enforcement officer or judge of the United States, in violation of 18 U.S.C. § 1512(a)(1)(C). Fowler argues that the government failed to present sufficient evidence to support his conviction. We affirm.

I. BACKGROUND

In March 1998, Christopher Gamble, Jeffrey Bouyie, and Andre Paige robbed a Holiday Inn in Dundee, Florida. They then decided they would rob a NationsBank the next morning, and they recruited Fowler and Robert Winston to help them. Fowler and Winston had a stolen Oldsmobile that they used to surveille the bank and that they intended to use in the robbery. After surveilling the bank, they retrieved guns, masks, and gloves, and went to the Oakland Cemetery to prepare for the bank robbery. After concocting their plan, the five men donned black clothing and started drinking, taking drugs, and listening to music. Shortly before daybreak, Fowler left the car to use cocaine, because he did not want the others to see how much he had.

While Fowler was away, Haines City Police Officer Todd Horner drove up behind the stolen Oldsmobile and shone its spotlight at the car and its occupants. The Oakland Cemetery was known as a high-crime area, particularly for drug trafficking, and as a place for leaving stolen cars. Officer Horner called the Haines City police dispatcher and reported that he was going to investigate a suspicious vehicle. He approached the group and told them not to move.

At trial, Gamble testified that Officer Horner then pulled out a gun and told the group to give him their names so that he could check for outstanding warrants. At that point, Fowler snuck up behind Officer Horner and Gamble started talking to Officer Horner to distract him. Once Fowler was directly behind Officer Horner, Fowler grabbed Officer Horner's gun and Gamble, Winston, and Paige helped Fowler gain control of it. At trial, Gamble explained that they had subdued Officer Horner because "by the clothing that we had on – I mean it happened so fast, we didn't have time to throw the clothes off and look like regular people. We was [sic] going to rob a bank. So, it was evident. He sees all this black, you know. He knowed [sic] that something ain't right, and he knowed [sic] before that I was robbing." Because it was spring in Florida, it was suspicious that all of the occupants were wearing black clothes and gloves.

Gamble told Officer Horner to relinquish the gun and that nothing would happen to him. Officer Horner then gave Fowler the gun and asked Gamble, "Chris, why are you doing this?" Gamble testified that when Officer Horner called him by his first name, the rest of the group lost control and "went a little crazy."

and Fowler stated that they would not be able to "walk away from this thing."

Fowler told Officer Horner to get on his knees. Gamble told Fowler to calm down and to give him the gun. Gamble reminded Fowler that Officer Horner knew only Gamble's name; if anything happened, Gamble would handle it and nothing would happen to Fowler. In the midst of the conversation, Bouyie yelled from the car, "kill that cracker," and Fowler shot Horner in the back of the head.

Gamble was later arrested and convicted for robbing an ABC Liquor Store in 1999 and was sentenced to 20 years' imprisonment in a state prison. In March 2002, while serving his sentence, Gamble called Polk County law enforcement officials and told them he had robbed the Holiday Inn the night that Officer Horner was killed. He eventually told them that Fowler had murdered Horner. Gamble subsequently pled guilty to federal crimes, including the Holiday Inn robbery, and received a life sentence with a consecutive sentence of 107 years' imprisonment.

In 2007, Fowler was indicted for murdering Officer Horner with the intent to prevent Horner from communicating information about a federal offense[1] to a federal law enforcement officer or judge of the United States, in violation of 18

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[1] The federal offenses that Fowler is alleged to have tried to conceal were: (1) the robbery of a Holiday Inn in violation of 18 U.S.C. § 1951; (2) conspiracy to commit bank robbery in violation of 18 U.S.C. §§ 371 and 2113; (3) conspiracy to commit robbery in violation of 18 U.S.C. §§ 371 and 1951; (4) possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g), and (5) possession of cocaine and marijuana in violation of 21 U.S.C. § 844

U.S.C. § 1512(a)(1)(C) ("Count 1").[2] The jury found Fowler guilty on both counts, and the court sentenced him to life imprisonment for Count 1 and ten years' imprisonment for Count 2, which were to run consecutively.

II. DISCUSSION

In relevant part, 18 U.S.C. § 1512(a)(1)(C) provides that it is a federal criminal offense to "kill[] . . . another person, with intent to . . . prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . . ."[3] Thus, for the government to prove a violation of § 1512(a)(1)(C) it must show: (1) the defendant knowingly and willfully killed a person; and (2) the defendant killed the person with the intent to prevent the communication of information "relating to the commission or possible commission of a [f]ederal . . . offense . . . ." 18 U.S.C. § 1512(a)(1)(C).

There is no question that Fowler killed Officer Horner with the intent to prevent his further investigation and discovery of the group's criminal activities.

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[2] Fowler was also indicted for knowingly using and carrying a firearm, during and in relation to a crime of violence for which he could be prosecuted in a federal court, in violation of 18 U.S.C. §§ 924(c)(1)(A) and (j)(1), 1111(a), and 2 ("Count 2").

[3] We view the evidence in the light most favorable to the government, and all "reasonable inferences and credibility determinations are drawn in favor of the verdict." United States v. Simpson, 228 F.3d 1294, 1299 (11th Cir. 2000). A verdict of guilty cannot be disturbed "unless no trier of fact could have found guilt beyond a reasonable doubt. United States v. Lyons, 53 F.3d 1198, 1202 (11th Cir. 1995).

Fowler argues, however, that no evidence was presented either that: (1) it was likely that there would be a federal investigation of any of the federal crimes involving Fowler and his group; or (2) it was likely that the information Officer Horner might have obtained would have been transferred to a federal officer or federal judge by Officer Horner. Thus, Fowler contends the government failed to prove the federal nexus to the murder, which is an essential element of a violation of § 1512(a)(1)(C). Fowler misperceives the requirements of the statute.

Nothing in § 1512(a)(1)(C) requires proof that a federal investigation is ongoing, imminent, or likely. To the contrary, the statute explicitly provides that the murder must have been intended to prevent communication relating to the "possible commission" of a federal offense. Id. (emphasis added). Fowler's sufficiency argument is based on his incorrect assertion that the federal nexus required by § 1512(a)(1)(C) requires proof that the victim would have likely communicated information relating to the possible commission of a federal offense to federal authorities. In construing the statute this way, Fowler focuses on the victim's state of mind instead of, as the statute requires, the defendant's state of mind. His approach has been rejected by the majority of our sister circuits and by this court in United States v. Veal, 153 F.3d 1233, 1251-52 (11th Cir. 1998), which addressed the similarly-worded § 1512(b)(3).[4]

In Veal, this court rejected a similar argument directed at § 1512(b)(3), which prohibits intimidating or threatening a person with intent to "hinder, delay or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." § 1512(b)(3) (emphasis added). This court held that to prove the required federal nexus, the government need prove only that there was "the possibility or likelihood . . . that information would be transferred to federal authorities." Veal, 153 F.3d at 1251-52 (emphasis in original).

In order to establish a violation of § 1512(a)(1)(C), the same issue as the one currently before the court, the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have all held that the government need not prove that a federal investigation is underway or imminent, but rather only that the defendant intended to prevent the murder victim from potentially communicating with federal law enforcement officials generally about a possible federal offense.[illegible] Subjective proof that the victim actually or likely would have provided information to federal authorities is not required; the defendant's intent is what matters. Accord United States v. Wright, 536 F.3d 819, 824 (8th Cir. 2008) ("the government need not prove that the defendant knew a federal investigation was underway, or even contemplated, or that defendant intended to prevent the victim from communicating with federal officials" but "that at least some part of a defendant's motive in killing that victim was to prevent communication with law enforcement

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[4] In relevant part, 18 U.S.C. § 1512(b)(3) provides that it is a federal offense to

> [K]nowingly use[] intimidation, threaten[] or corruptly persuade[] another person, or attempt[] to do so, or engage[]in misleading conduct toward another person, with intent to . . . hinder, delay or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . . ." (emphasis added).

[illegible] See United States v. Wright, 536 F.3d 819, 824 (8th Cir. 2008), cert. denied, 129 S. Ct. 1656 (2009); United States v. Harris, 498 F.3d 278, 286-87 (4th Cir. 2007) cert. denied, 128 S. Ct. 1703 (2008); United States v. Serrata, 425 F.3d 886, 897-898 (10th Cir. 2005) (in § 1512 cases "imminence of a federal investigation is of little or no consequence") (collecting cases); United States v. Bailey, 405 F.3d 102, 108 (1st Cir. 2005) (rejecting defendant's argument that similarly-worded and interpreted obstruction statute, § 1512(b)(3), "requires an existing or imminent federal investigation at the time of the defendant's misleading conduct"); United States v. Jefferson, 149 F.3d 444, 446 (6th Cir. 1998) (sufficient evidence that a murder had been motivated in part by a desire to eliminate a witness even though the murder could not have been intended to prevent the victim from reporting a robbery because the robbery had not yet been committed); United States v. Romero, 54 F.3d 56, 62 (2d Cir. 1995) ("The victim need not have agreed to cooperate with any federal authority or even to have evinced an intention or desire to so cooperate. There need not be an ongoing investigation or even any intent to investigate. Rather, the killing of an individual with the intent to frustrate the individual's possible cooperation with federal authorities is implicated by the statute."); United States v. Edwards, 36 F.3d 639, 645 (7th Cir. 1994), abrogated on other grounds, (holding that the essential mental state for violation of § 1512(a)(1)(C) is that "the defendant believed that a person might furnish information to federal officials and that he killed or attempted to kill that person in order to prevent such disclosure") (second emphasis added); United States v. Galvan, 949 F.2d 777, 783 (5th Cir. 1991). But see United States v. Bell, 113 F.3d 1345, 1349, 1357 (3d Cir. 1997) (holding that "the government may carry [its] burden [of proving a federal nexus] by showing that the conduct which the defendant believed would be discussed in these communications constitutes a federal offense, so long as the government also presents "additional appropriate evidence" and that the defendant's knowledge of the federal involvement or the officer's status as a federal officer is "irrelevant").

officials in the investigation of a possible federal crime") (emphasis, citation, and internal quotation marks omitted); United States v. Harris, 498 F.3d 278, 286-87 (4th Cir. 2007) ("So long as the information the defendant seeks to suppress actually relates to the commission or possible commission of a federal offense, the federal nexus requirement is established . . . Thus, under the plain meaning of the applicable statutory language, the government need not prove any state of mind regarding whether the potential investigation that a defendant sought to affect would be conducted by federal officers.") (emphasis omitted); United States v. Galvan, 949 F.2d 777, 783 (5th Cir. 1991) ("[T]he statute focuses on the defendant's intent: whether she thought she might be preventing [the witness's] future communication of information") (emphasis added).

We now join our sister circuits and apply the rationale in Veal, holding that the possible or potential communication to federal authorities of a possible federal crime is sufficient for purposes of section 1512(a)(1)(C). See id. at 1251-52, 1251 n.26.[6]

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[6] Fowler's reliance on United States v. Ronda, 455 F.3d 1273 (11th Cir. 2006) is misplaced. That case involved police officers falsifying evidence and making false statements in the investigation of police shootings, and the evidence adduced at trial was that, when a police officer fires his weapon, a "'massive investigation'" ensues, which included consultation with federal officials. Id. at 1285-86. This court held that the evidence was sufficient for the federal nexus required for a § 1512(b)(3) conviction. Id. at 1287. Though there was evidence presented in Ronda that it was likely that the evidence would have been transferred to federal authorities, the Ronda court focused on and unequivocally adopted the Veal standard that criminal liability under "Section 1512(b)(3) 'does not depend on the existence or imminency of a federal case or

Here, the federal nexus requirement was clearly satisfied. When Officer Horner discovered the group at the cemetery, they were clad in black and wearing gloves on a spring morning in Florida in a high crime area. Gamble testified that it was obvious that the group was in the process of preparing for illegal activity. Three of them, including Gamble (who Officer Horner knew from his previous robberies) had just committed a robbery affecting interstate commerce; all of them were conspiring to rob a bank; there was evidence in the car to indicate that they were going to (or had already) engaged in armed robbery; and the group had in its collective possession firearms, a stolen car, marijuana, and cocaine. These were all federal crimes and could have led to a federal investigation and prosecution.[7] These facts adequately support Fowler's conviction for violating § 1512(a)(1)(C).

AFFIRMED.

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investigation but rather on the possible existence of a federal crime and a defendant's intention to thwart an inquiry into that crime." Id. at 1287, 1290 (quoting Veal, 153 F.3d at 1250) (emphasis in Veal)).

[7] Bank robbery, robbery affecting interstate commerce, being a felon in possession of a firearm, and possession of a controlled substance violate the following statutory provisions in respective order: 18 U.S.C. §§ 2113, 1951, 922(g); 21 U.S.C. § 844(a).

OPPOSITION
BRIEF

30 ⑲

RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
OCT 14 2010
OFFICE OF THE CLERK

No. 10-5443

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES FOWLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

2010 OCT 14 P 4: 02

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QUESTION PRESENTED

Whether 18 U.S.C. 1512(a)(1)(C), which makes it a crime to kill someone with the intent to prevent the communication to a federal law enforcement officer or federal judge of information relating to the commission or possible commission of a federal offense, requires proof that the victim would in fact have communicated information to federal officers.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 603 F.3d 883.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 2010. The petition for a writ of certiorari was filed on July 13, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of killing another person with intent to prevent communication to a federal law enforcement officer or federal judge about the commission or possible commission of a federal crime, in violation of 18 U.S.C. 1512(a)(1)(C), 1512(a)(2)(A), 1111(a), and 2; and using and carrying a firearm during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A), 924(j)(1), 1111(a), and 2. Judgment at 1. Petitioner was sentenced to life imprisonment on the first count and a consecutive sentence of ten years on the second count. Id. at 2. The court of appeals affirmed. Pet. App. A1-A10.

1. Petitioner and a companion, both of whom belonged to a gang known as the "Seventh Street Thugs," were recruited by three fellow gang members in March 1998 to participate in a bank robbery. Pet. App. A2; Gov't C.A. Br. 4. The three fellow gang members had just robbed a Holiday Inn, and they planned to rob a branch of NationsBank the following morning. Pet. App. A3. After conducting surveillance of the bank in a stolen car, the five men gathered the various items they would need and met before dawn in Oakland Cemetery. Id. at A2; Gov't C.A. Br. 4-5. They planned the bank robbery, put on black clothes and gloves, and gathered around the stolen car to listen to music, drink, and use marijuana and cocaine. Pet. App. A2-A3; Gov't C.A. Br. 4-5.

While this was going on, Haines City Police Officer Christopher Todd Horner drove up and shined his spotlight on the car and its occupants. Pet. App. A3; Gov't C.A. Br. 5. Officer

Horner approached the men, told them not to move, drew his gun, and asked for their names. Pet. App. A3.

Petitioner happened to be away from the car when Officer Horner arrived, because he had gone off to use cocaine on his own so that the others would not see how much he was taking. Pet. App. A2. He sneaked up behind Officer Horner and grabbed for Officer Horner's gun. Id. at A3. After a struggle, petitioner and the rest of his group subdued Officer Horner and took the gun. Ibid.

The group realized that it was obvious to Officer Horner that they were dressed for a robbery, and they "went a little crazy" when Officer Horner demonstrated that he knew the first name of one group member. Pet. App. A3. Petitioner, who was holding the gun, said that they "would not be able to 'walk away from this thing.'" Id. at A3-A4.

Petitioner told Officer Horner to get on his knees. Pet. App. A4. Although one member of the group tried to calm petitioner down, another yelled at him to "kill that cracker." Ibid. Petitioner shot Officer Horner in the back of the head and killed him. Ibid.

2. Officer Horner's death remained unsolved until 2002, when another member of petitioner's group told the story to county law enforcement officials. Pet. App. A4. A grand jury returned an indictment charging petitioner with one count of killing another person with intent to prevent communication to a federal law

enforcement officer or federal judge about the commission or possible commission of a federal crime, in violation of 18 U.S.C. 1512(a)(1)(C), 1512(a)(1)(A), 1111, and 2; and using and carrying a firearm during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A), 924(j)(1), 1111(a), and 2. Indictment at 1-3.

18 U.S.C. 1512(a)(1)(C) makes it a crime to "kill[] * * * another person, with intent to * * * prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." For purposes of that provision, the term "law enforcement officer" includes "an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an advisor or consultant," who is "authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense." 18 U.S.C. 1515(a)(4). Section 1512(g)(2) specifies that "[i]n a prosecution for an offense under this section, no state of mind need be proved with respect to" whether the relevant "law enforcement officer" is in fact "an officer or employee of the Federal Government or a person authorized to act for on behalf of the Federal Government or serving the Federal Government as an adviser or consultant." See 18 U.S.C. 1512(f)(2) (1994) (identical language in effect when petitioner killed Officer Horner).

3. At the close of the government's case at trial, petitioner moved for a judgment of acquittal solely on the ground that testimony of the primary prosecution witness, petitioner's fellow gang member, was not credible. Gov't C.A. Br. 7-8; see Fed. R. Crim. P. 29(a). Petitioner did not argue that the government had failed to prove the federal nexus required by Section 1512(a)(1)(C). Gov't C.A. Br. 8. The district court denied the motion. Ibid.

Petitioner's counsel renewed that motion after the jury had been charged, stating simply that he "need[ed] to renew a motion that I made at the conclusion of the Government's case." Gov't C.A. Br. 8. The district court again denied the motion. Ibid.

In its charge to the jury on the elements of the Section 1512(a)(1)(C) offense, the district court instructed the jury that it had to find beyond a reasonable doubt:

> First, that [petitioner] killed Christopher Todd Horner as charged and, second, that [petitioner] killed Christopher Todd Horner knowingly and willfully with the intent to prevent him from communicating information relating to the commission or possible commission of a federal offense to a law-enforcement officer or a judge of the United States.

Gov't C.A. Br. 8. The court further explained that the government alleged that:

> the killing was done to prevent the communication by Christopher Todd Horner of information relating to one or more of the following federal offenses: One, the robbery of a Holiday Inn in violation of Title 18 U.S.C. Section 1951; two, a conspiracy to rob a bank in violation of Title 18 United States Code, Sections 1951, 2113, and 371; three, the possession of a firearm by a convicted felon in violation of

> Title 18 United States Code, Section 922(g); and/or four, possession of a controlled substance in violation of Title [21] United States Code, Section 844(a).

Gov't C.A. Br. 8-9. Petitioner did not object to the charge or request an alternative instruction on the federal nexus requirement.

The jury found petitioner guilty on both counts. Pet. App. A5. Petitioner was sentenced to life imprisonment on the first count and a consecutive sentence of ten years on the second count. *Ibid.*

4. On appeal, petitioner claimed that the evidence was insufficient to support his conviction under Section 1512(a)(1)(C) because the evidence failed to show that it was likely that there would be a federal investigation of the group's crimes or that Officer Horner likely would have communicated information about those crimes to federal officials. Pet. App. A6. The court of appeals rejected that claim. *Id.* at A6-A10.

The court of appeals first held that the government did not need to show that a federal investigation was "ongoing, imminent, or likely." Pet. App. A6. Quoting Section 1512(a)(1)(C), the court stated that the statute requires only that "the murder must have been intended to prevent communication relating to the '*possible* commission' of a federal offense." Pet. App. A6.

The court of appeals next held that petitioner erred in contending that the federal nexus requires proof that the victim "would have likely communicated information relating to the possible commission of a federal offense to federal authorities." Pet. App. A6. That contention, the court of appeals reasoned, improperly "focuses on the victim's state of mind instead of, as the statute requires, the *defendant's* state of mind." *Ibid.* The court of appeals explained that the proper inquiry, as described by numerous federal circuits, focuses on whether the defendant "intended to prevent the murder victim from potentially communicating with federal law enforcement officials generally about a possible federal offense." *Id.* at A7-A8. Citing cases from numerous other federal circuits, the court of appeals held that "the *possible* or *potential* communication to federal authorities of a possible federal crime is sufficient for purposes of section 1512(a)(1)(C)." Pet. App. A9; see *id.* at A8 n.5.

Applying its construction of the statute to the facts, the court concluded that "the federal nexus was clearly satisfied." Pet. App. A10. The court recited the evidence establishing that the group was "obvious[ly] * * * in the process of preparing for illegal activity," and had committed (or was about to commit) several "federal crimes" that "could have led to a federal investigation and prosecution": a robbery affecting interstate commerce (of the Holiday Inn), conspiracy to rob a bank, bank robbery, firearm possession by a convicted felon, and possession of controlled substances. *Id.* at A10; see *id.* at A10 n.7 (citing 18

U.S.C. 922(g) (possession of a firearm by a felon), 1951 (robbery affecting interstate commerce), 2113 (bank robbery), and 21 U.S.C. 844(a) (drug possession)).

ARGUMENT

Petitioner renews his claim that Section 1512(a)(1)(C) requires "proof that information regarding a possible Federal crime would have been transferred from the victim to Federal law enforcement officers or judges" (Pet. 11) -- that is, "proof of the victim's intention to communicate with Federal officials" (Pet. 17). That claim lacks merit, and no court of appeals has read such a requirement into the statute. Petitioner moreover forfeited any claim regarding the proper interpretation of the statute by failing to raise such a claim in the district court. Further review is unwarranted.

1. The court of appeals correctly held that the victim's intent to communicate with federal officials is not an element of Section 1512(a)(1)(C). As the court of appeals recognized (Pet. App. At A8), the statutory language focuses exclusively on the defendant's intent, not the victim's. See 18 U.S.C. 1512(a)(1)(C) ("Whoever kills * * * another person, with intent to * * * prevent the communication by any person to" a federal official "information relating to the commission or possible commission of a Federal offense * * * shall be punished.") (emphasis added). Whether information actually "would have been transferred from the

victim to Federal law enforcement" had the victim lived (Pet. i), is not directly relevant. Cf. *United States* v. *Aguilar*, 515 U.S. 593, 598, 601-602 (1995) (defendant may "corruptly * * * endeavor[] to influence, obstruct, or impede" a grand jury investigation if he "lie[s] to a subpoenaed witness who is ultimately not called to testify, or who testified but does not transmit the defendant's version of the story") (quoting 18 U.S.C. 1503).[1] This Court "ordinarily resist[s] reading words or elements into a statute that do not appear on [the statute's] face," and there is no warrant for reading in petitioner's suggested victim-intent element here. *Bates* v. *United States*, 522 U.S. 23, 29 (1997); accord, *e.g.*, *United States* v. *Wells*, 519 U.S. 482, 490 (1997); *National Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 256-257 (1994).

2. Petitioner asserts (Pet. 14) that the "Circuit Courts are divided on the meaning of §1512(a)(1)(C)." In support of that assertion, petitioner relies exclusively on a single Second Circuit decision, *United States* v. *Lopez*, 372 F.3d 86 (2004), vacated on other grounds, 544 U.S. 902 (2005). See Pet. 14-17. That decision does not support petitioner's interpretation of the statute. It simply says that evidence of the victim's intent to speak with

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[1] Indeed, Section 1512(a)(1)(C) does not even require that the defendant believe that the victim *himself* would pass along information to federal authorities; rather, the statute prohibits a murder intended to prevent such communication "by *any* person" (emphasis added).

federal officers is *one* form of evidence that can be used to prove a federal nexus, not that it is the *only* form of evidence that will suffice.

The Second Circuit held in *Lopez* that the government can meet its burden to prove a federal nexus under Section 1512(a)(1)(C) by proving that the defendant intended to suppress communication about conduct that "constitutes a federal offense," and by presenting "additional appropriate evidence" regarding the potential for communication to a federal officer. *Lopez*, 372 F.3d at 91 (citation omitted). In concluding that the government had not carried its burden of introducing "additional appropriate evidence" in *Lopez* itself, the court noted that, among other things, there was no evidence that the victim actually had any intent to communicate with federal officials. *Id.* at 92. But such intent evidence was not the only sort of evidence that might have sufficed for conviction. See, *e.g.*, *ibid.* (noting the absence of evidence that the defendant "knew of the federal nature of his offense at the time" of the murder); see also *id.* at 91. Indeed, the court declined to provide a comprehensive definition of what sort of "additional appropriate evidence" might be necessary in a particular prosecution, instead leaving the matter for case-by-case adjudication. *Id.* at 91.

3. There is some tension among the circuits as to whether any "additional appropriate evidence" of the sort described in

Lopez is necessary for conviction under Section 1512(a)(1)(C), or whether the federal nature of the underlying crimes alone suffices. Compare, e.g., Lopez, 372 F.3d at 91 (requiring such evidence); United States v. Causey, 185 F.3d 407, 422 (5th Cir. 1999) (same), cert. denied, 530 U.S. 1277 (2000); United States v. Bell, 113 F.3d 1345, 1349 (3d Cir.) (same), cert. denied, 522 U.S. 984 (1997),[2] with United States v. Harris, 498 F.3d 278, 286 (4th Cir. 2007) ("So long as the information the defendant seeks to suppress actually relates to the commission or possible commission of a federal offense, the federal nexus requirement is established."), cert. denied, 552 U.S. 1261 (2008); United States v. Wright, 536 F.3d 819, 824 (8th Cir. 2008) (citing Harris with approval), cert. denied, 129 S. Ct. 1656 (2009). To the extent that the petition might be read to allege that "additional appropriate evidence" was missing in petitioner's case, that issue does not merit review.

To begin with, the issue was not squarely presented below. Petitioner never expressly argued that the federal nature of the crimes that he and his companions were committing was insufficient to satisfy the federal nexus requirement, and he never cited Lopez or any other case from the circuits that require "additional appropriate evidence" in Section 1512(a)(1)(C) cases. Instead, he more narrowly contended that the government had to prove particular facts in order to convict him -- namely, that (1) it was likely there would be a federal investigation of the federal crimes he and his companions had committed or planned to commit, or (2) it was likely that Officer Horner would have passed along information about those crimes to a federal official. Pet. App. A6. The court of appeals properly rejected those contentions. Id. at A6-A10.[3] This Court does not typically address claims that have been neither pressed nor passed on below, see, e.g., United States v. Williams, 504 U.S. 36, 41 (1992), and it should follow that practice here.

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[2] More recent Third Circuit cases interpreting the materially identical federal-nexus requirement of 18 U.S.C. 1512(b)(3) (which prohibits witness tampering), have retreated from the "additional appropriate evidence" requirement. See United States v. Guadalupe, 402 F.3d 409, 412-413 (3d Cir. 2005), cert. denied, 547 U.S. 1123 (2006) (citing United States v. Applewhaite, 195 F.3d 679, 687 (3d Cir. 1999)).

Further review is additionally unwarranted because petitioner's failure to raise this, or any other argument concerning the proper interpretation of Section 1512(a)(1)(C), to the district court. That omission means that this Court could, at best, review the matter for plain error. See Fed. R. Crim. P. 52(b).[4] Indeed, at least one court of appeals has held that, when a defendant moves for a judgment of acquittal on specific grounds, any unraised grounds will be reviewed under a standard even more deferential than plain error. See United States v. Herrera, 313 F.3d 882, 884-885 & n.* (5th Cir. 2002) (finding forfeiture in those circumstances and stating that "review is limited to determining whether the record is devoid of evidence pointing to guilt") (internal alterations and citation omitted), cert. denied, 537 U.S. 1242 (2003); see also, e.g., United States v. Graf, 610 F.3d 1148, 1166 (9th Cir. 2010) (finding forfeiture in those circumstances); United States v. Wesley, 417 F.3d 612, 617 (6th Cir. 2005) (same).

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[3] The court of appeals' opinion cited the Third Circuit's Bell decision in a footnote, see Pet. App. A8 n.5, but does not provide any discussion of whether or to what extent general "additional appropriate evidence" might be required in a Section 1512(a)(1)(C) prosecution.

[4] The government presented this plain-error argument to the court of appeals, which affirmed the conviction without addressing the issue. See, e.g., Gov't C.A. Br. 9-10.

To prevail on plain-error review, petitioner would have to show (1) an "error" (2) that is "clear or obvious, rather than subject to reasonable dispute," (3) that "affected [his] substantial rights," and (4) that "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." United States v. Marcus, 130 S. Ct. 2159, 2164 (2010) (citation omitted). Petitioner cannot make that showing. Among other things, any error here was neither "clear" nor "obvious." Cf. United States v. Williams, 469 F.3d 963, 966 (11th Cir. 2006) (no plain error when there is no controlling case law and circuits are split); United States v. Teague, 443 F.3d 1310, 1319 (10th Cir.) (same), cert. denied, 549 U.S. 911 (2006). No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2010

No. 10-5443

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES FOWLER, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION**, via email and first-class mail, postage prepaid, this 14th day of October, 2010.

[See Attached Service List]

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October 14, 2010

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Emily C. Spadoni, Supervisor Case Management, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov**. Ms. Spadoni's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

12-5443
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REPLY
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NO. 10 - 5443

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2010

CHARLES FOWLER,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S ARGUMENT IN REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION

The Petitioner, Charles Fowler, respectfully submits his Reply to the Government's Brief in Opposition to the Petition for Certiorari.

Fowler has been convicted of murdering Haines City Police Officer Christopher Horner even though (1) many law enforcement officials in Polk County, Florida, were convinced that Officer Horner had committed suicide, and (2) the Government's trial expert — Dr. Stephen Nelson — classified the death as a homicide for several reasons, including the absurd notion that white people are not likely to commit suicide in a predominantly black cemetery. Fowler's Petition for Certiorari, pages 6, 10 - 11.

The State Attorney for Polk County never prosecuted Fowler or anyone else in connection with the death of Officer Horner. The Federal Government, however, relied on the incriminating statements of Christopher Gamble, a Florida state prison inmate, and charged Fowler and others with the murder of Officer Horner in violation of 18 U.S.C. §1512(a)(1)(C).

The Eleventh Circuit affirmed Fowler's conviction even though there was no evidence that information allegedly obtained by Officer Horner on the morning of March 3, 1998, would have been transferred to a federal law enforcement officer or judge. In the Eleventh Circuit's opinion, the "possible or potential communication to federal authorities of a possible federal crime is sufficient for purposes of section 1512(a)(1)(C) .... Here, the federal nexus requirement was clearly satisfied .... These [the offenses which Fowler, Gamble, and others allegedly were perpetrating on the morning of March 3, 1998] were all federal crimes and could have led to a federal investigation and prosecution. These facts adequately support Fowler's conviction for violating §1512(a)(1)(C)...." Eleventh Circuit's decision of April 14, 2010; Pet. App. A, pages 9 - 10. (Eleventh Circuit's emphasis).

The Eleventh Circuit thus took the view that the mere possibility of a federal crime is all that the Government needs to satisfy the federal nexus requirement of §1512(a)(1)(C). In contrast to the Eleventh Circuit, the Second Circuit held in United States v. Lopez , 372 F.3d 86 (2d Cir. 2004), that the mere existence of a federal crime is not enough to convict a defendant under Section 1512(a)(1)(C). (The defendant in Lopez sought review of his sentence on the remaining counts of conviction. The Supreme Court granted his Petition for Certiorari and remanded "for further consideration in light of United States v. Booker, 543 U.S. 220 (2005)." 544 U.S. 902).

The Second Circuit made it clear in Lopez that "the government must adduce evidence from which a rational juror could infer that the victim plausibly might have turned to federal officials." See Lopez, 372 F.3d at 92. If the Lopez standard were applied in the present case, Fowler would have been entitled to a judgment of acquittal. The conflict between the Eleventh Circuit's decision in

Fowler's case and the Second Circuit's decision in Lopez could not be clearer.

The Government has attempted to minimize Lopez by arguing that the emphasis on the victim's conduct is just one of several factors that the Government can present to establish the federal nexus. Government's Brief in Opposition, page 10. Fowler disagrees with the Government's suggestion that Lopez would permit a conviction to stand merely on the possibility that a federal crime had been committed.

To the contrary, the Second Circuit reviewed its own precedent and applicable decisions from other Courts of Appeal and concluded that "in every other case in this or in any other circuit that has addressed this issue and affirmed a conviction there similarly has been at least some evidence of federal involvement beyond the underlying federal crime to be discussed with the federal official...." See Lopez, 372 F.3d at 92. (Emphasis supplied). The Second Circuit then stated that if federal involvement was not already underway, the Government was bound to prove the victim's intention to turn to federal officials:

> Where there has been no such federal involvement, however, other courts have found the evidence insufficient. *See, e.g., United States* v. *Causey*, 185 F.3d 407, 422-23 (5th Cir.1999). Such cases have been, and likely will be, rare. As we have explained, after all, "the killing of an individual with the intent to frustrate the individual's *possible* cooperation with federal authorities is implicated by the statute." *Romero*, 54 F.3d at 62 (emphasis added). Yet there must be *evidence* —— not merely argument —— of such a possibility. In other words, the government must adduce evidence from which a

> rational juror could infer that the victim *plausibly* might have turned to federal officials.

See Lopez, 372 F.3d at 92 (emphasis added)

The Second Circuit determined in Lopez that the evidence was insufficient to sustain a conviction under §1512(a)(1)(C). The defendant, Carlos Lopez, was a Brooklyn drug dealer who had threatened Edward Montalvo at gunpoint. Montalvo reported the incident to the New York City police; expressed fear that Lopez would kill him; and obtained a temporary order of protection against Lopez from a state court. A few days later, Lopez went to Montalvo's apartment and shot and killed him. See Lopez, 372 F.3d at 89.

Even though Lopez had committed federal weapons offenses, the Second Circuit reversed his conviction under §1512(a)(1)(C) because Montalvo never went to the Federal authorities for help:

> Here, the government has adduced no such "additional appropriate evidence." All the government proved was that conduct punishable under both state and federal law was involved and that Montalvo was willing to communicate with *local* authorities. The government did show that Montalvo feared for his life after the district attorney declined to pursue more serious charges. But even after that decision, Montalvo did not turn to federal officials; instead, he returned to *local* authorities for a protective order. There simply is no evidence that, despite the passage of over ten days between the issuance of the protective order and his murder, Montalvo ever turned to, or gave so much as a moment's thought of turning to, federal officers, or that federal agents were otherwise involved. The government provided no evidence, for example, that a federal investigation was underway, that federal authorities were in any way involved, that Lopez

> knew of the federal nature of his offense at the time he murdered Montalvo, or that Montalvo intended to communicate or anticipated communicating with federal authorities. *See, e.g.,* Causey, 185 F.3d at 422-23. It is always possible that Montalvo someday "might" have turned to federal officials; but the range of things he "might" do is limitless, and no evidence in the record connects this possibility with reality. On these facts, even drawing all reasonable inferences in the government's favor, we hold that a reasonable jury could not conclude that Lopez killed Montalvo to prevent his communication to a federal law enforcement officer. Accordingly, we reverse Lopez's conviction on Count III.

See Lopez, 372 F.3d at 92 (emphasis supplied).

The majority decision in Lopez drew a dissent from Judge Jon Newman. The dissenting judge did not dispute the standards governing §1512(a)(1)(C) so much as he disagreed with the majority's conclusion that the evidence failed to establish Montalvo's intention to communicate with Federal officials:

> Of course, the statute requires something more than the theoretical possibility that the victim would have communicated with a federal official. When a person knows of conduct that constitutes a federal crime, the possibility, in that sense, always exists that he will tell some federal official. If that sort of possibility sufficed, the statute would be violated by anyone murdering a person who knew about a federal crime. The statute must be understood to mean that the possibility of a communication with a federal official has some plausibility. The evidence must provide the jury with some reason to believe that there was a realistic likelihood that the victim would have communicated with a federal official....
>
> .... Where, as here, there is evidence that the victim feared the defendant would kill him, sought a protective order, urged a local prosecutor to bring serious charges against the defendant to prevent the defendant's early release, and was understandably alarmed when his plea for local

> prosecution on serious charges was rejected, it is entirely reasonable to conclude that he would then have turned to federal authorities and reported the defendant's federal criminal conduct.

See Lopez, 372 F.3d at 95 - 96 (emphasis supplied).

In Fowler's case, there was no proof of any sort that would have come close to satisfying the majority and dissenting views in Lopez . The Government, for example, did not bother to establish that police officers in Haines City notified federal officials of arrests or suspected criminal activity within their community. To use the dissent's language in Lopez, the jury in Fowler's case did not have any reason to "believe that there was a realistic likelihood that the victim would have communicated with a federal official."

The Eleventh Circuit's decision is not compatible with the proper allocation of federal and state criminal laws in the United States. In declaring the Gun-Free School Zones Act unconstitutional under the Commerce Clause, the Supreme Court stated in United States v. Lopez, 514 U.S. 549 (1995)(hereinafter "Lopez/Supreme Court") :

> Under our federal system, the "'States possess primary authority for defining and enforcing the criminal law.' " Brecht v. Abrahamson, 507 U. S. 619, 635 (1993) (quoting Engle v. Isaac, 456 U. S. 107, 128 (1982)); see also Screws v. United States, 325 U. S. 91, 109 (1945) (plurality opinion) ("Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses

> against the United States"). When Congress criminalizes conduct already denounced as criminal by the States, it effects a "'change in the sensitive relation between federal and state criminal jurisdiction.' " United States v. Enmons, 410 U. S. 396, 411-412 (1973) (quoting United States v. Bass, 404 U. S. 336, 349 (1971)).

Lopez/Supreme Court, 514 U.S. at 561, footnote 3 (1995)

Section 1512(a)(1)(C) criminalizes murder, perhaps the most reviled and denounced form of human conduct from time immemorial. The Eleventh Circuit's wide-open interpretation of §1512(a)(1)(C) cannot be justified in light of the foregoing call for restraint in Lopez/Supreme Court. The Second Circuit's interpretation of the statute in Lopez, 372 F.3d 86, should be applied in Fowler's case and a judgment of acquittal entered in his favor.

CONCLUSION

For the reasons stated in his Petition for Certiorari and this Reply Brief, Charles Fowler respectfully requests that his Petition be granted.

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JOINT APPENDIX

1

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No. 10-5443

In The Supreme Court of the United States

◆

CHARLES FOWLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

◆

JOINT APPENDIX

◆

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United States District Court
Middle District of Florida – Tampa Division
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#8:07-CR-380-T-30TGW

United States of America v. Charles Andrew Fowler

Date Filed	Docket Number	Docket Text
09/19/2007	1	INDICTMENT returned in open Court as to Charles Andrew Fowler (1) count(s) 1,2. (ldb)(Entered: 09/20/2007)
09/20/2007	8	Minute Entry for proceedings held before Judge Thomas B. McCoun III:INITIAL appearance and ARRAIGNMENT as to Charles Andrew Fowler (1) Count 1,2 held on 9/20/2007. Defendant(s) pled not guilty. Defendant does not contest detention at this time. (DIGITAL) (src) (Entered: 09/24/2007)
06/09/2008	58	Minute Entry for proceedings held before Judge James S. Moody, Jr: JURY SELECTION AND TRIAL (DAY 1) held on 6/9/2008 as to Charles Andrew Fowler. Evidence entered. Trial will resume on 6/10/08 at 9:00 a.m. Court Reporter: Sherrill L. Jackson (SMB) (Entered: 06/09/2008)

06/10/2008	59	Minute Entry for proceedings held before Judge James S. Moody, Jr: JURY TRIAL (DAY 2) as to Charles Andrew Fowler held on 6/10/2008. Evidence entered. Trial will resume on 6/11/08 at 8:45 a.m. Court Reporter: Sherrill L. Jackson (SMB) (Entered: 06/10/2008)
06/11/2008	64	Minute Entry for proceedings held before Judge James S. Moody, Jr: JURY TRIAL (DAY 3) as to Charles Andrew Fowler held on 6/11/2008. Evidence entered. Trial will resume on 6/12/08 at 9:00 a.m. Court Reporter: Sherrill L. Jackson (SMB) (Entered: 06/11/2008)
06/12/2008	65	Minute Entry for proceedings held before Judge James S. Moody, Jr: JURY TRIAL (DAY 4) as to Charles Andrew Fowler held on 6/12/2008. Evidence entered. Government rests. Trial will resume on 6/13/08 at 9:15 a.m. Court Reporter: Sherrill L. Jackson (SMB) (Entered: 06/12/2008)
06/13/2008	69	Minute Entry for proceedings held before Judge James S. Moody, Jr: JURY TRIAL (DAY 5) as to Charles Andrew Fowler held on 6/13/2008. Evidence entered. Trial will resume on

		Monday, 6/16/08, at 8:45 a.m. Court Reporter: Sherrill L. Jackson (SMB) (Entered: 06/13/2008)
06/16/2008	72	Minute Entry for proceedings held before Judge James S. Moody, Jr: JURY TRIAL (DAY 6) as to Charles Andrew Fowler held on 6/16/2008. Testimony concluded. Jury charged. Deliberations begun. Deliberations to resume on 6/17/08 at 9:00 a.m. Court Reporter: Sherrill L. Jackson (SMB) (Entered: 06/16/2008)
06/17/2008	73	Minute Entry for proceedings held before Judge James S. Moody, Jr: JURY TRIAL (DAY 7) as to Charles Andrew Fowler held on 6/17/2008. Verdict reached and published in open court. Defendant is found guilty on both counts of the Indictment. Jury polled. Trial concluded. Court Reporter: Sherrill L. Jackson (SMB) (Entered: 06/17/2008)
06/17/2008	75	JURY VERDICT as to Charles Andrew Fowler (1): Guilty on Counts 1 and 2 of the Indictment. (SMB) (Entered: 06/17/2008)

09/18/2008	82	Minute Entry for proceedings held before Judge James S. Moody, Jr.: SENTENCING held on 9/18/2008 for Charles Andrew Fowler (1), Count(s) 1, Imprisonment: LIFE imprisonment plus 120 months (total); LIFE imprisonment as to Count 1 and 120 months as to Count 2, mandatory consecutive to Count 1; Supervised Release: 60 months (concurrent); Fine: Waived; Special Assessment: $200 (total) – $100 per count. Court Reporter: Sherrill L. Jackson (SMB) (Entered: 09/18/2008)
09/19/2008	84	JUDGMENT as to Charles Andrew Fowler (1), Counts 1 and 2, Imprisonment: LIFE imprisonment plus 120 months (total); LIFE imprisonment as to Count 1 and 120 months as to Count 2, mandatory consecutive to Count 1; Supervised Release: 60 months (concurrent); Fine: Waived; Special Assessment: $200 (total) – $100 per count. Signed by Judge James S. Moody, Jr on 9/19/2008. (SMB) (Entered: 09/19/2008)
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		(Crawford, Stephen) (Entered: 09/22/2008)
11/23/2008	90	TRANSCRIPT of Jury Trial for dates of 6/9/08 held before Judge James S. Moody, Jr., re: 85 Notice of appeal as to Charles Andrew Fowler. Court Reporter: Sherrill L. Jackson, RPR, FPR; Telephone Number: 813/301-5041. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or purchased through the Court Reporter. Redaction Request due 12/15/2008, Redacted Transcript Deadline set for 12/24/2008, Release of Transcript Restriction set for 2/23/2009. (SJ) (Entered: 11/23/2008)
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11/26/2008	95	TRANSCRIPT of Jury Trial for dates of 6/13/08 held before Judge James S. Moody, Jr., re: 85 Notice of appeal as to Charles Andrew Fowler. Court Reporter: Sherrill L. Jackson, RPR, FPR; Telephone Number: 813/301-5041. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or purchased through the Court Reporter. Redaction Request due 12/17/2008, Redacted Transcript Deadline set for 12/29/2008, Release of Transcript Restriction set for 2/24/2009. (SJ) (Entered: 11/26/2008)
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12/03/2008	99	TRANSCRIPT of Jury Trial for dates of 6/12/08 held before Judge James S. Moody, Jr., re: 85 Notice of appeal as to Charles Andrew Fowler. Court Reporter: Sherrill L. Jackson, RPR, FPR; Telephone Number: 813/301-5041. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or purchased through the Court Reporter. Redaction Request due 12/24/2008, Redacted Transcript Deadline set for 1/5/2009, Release of Transcript Restriction set for 3/3/2009. (SJ) (Entered: 12/03/2008)

12/03/2008	100	TRANSCRIPT of Jury Trial for date of 6/16/08 held before Judge James S. Moody, Jr., re: 85 Notice of appeal as to Charles Andrew Fowler. Court Reporter: Sherrill L. Jackson, RPR, FPR; Telephone Number: 813/301-5041. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or purchased through the Court Reporter. Redaction Request due 12/24/2008, Redacted Transcript Deadline set for 1/5/2009, Release of Transcript Restriction set for 3/3/2009. (SJ) (Entered: 12/03/2008)
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		for Release of Transcript Restriction. After that date it may be obtained through PACER or purchased through the Court Reporter. Redaction Request due 12/24/2008, Redacted Transcript Deadline set for 1/5/2009, Release of Transcript Restriction set for 3/3/2009. (SJ) (Entered: 12/03/2008)
01/06/2009	108	TRANSCRIPT of Oral Argument for dates of 12/22/08 held before Judge James S. Moody, Jr., re: 85 Notice of appeal as to Charles Andrew Fowler. Court Reporter/Transcriber Penny Appleton with Berryhill & Associates, Telephone number 813-229-8225. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or purchased through the Court Reporter. Redaction Request due 1/27/2009, Redacted Transcript Deadline set for 2/6/2009, Release of Transcript Restriction set for 4/6/2009. (LDB) (Entered: 01/06/2009)

03/18/2009	113	TRANSCRIPT of Excerpt from Jury Trial (Jury Charge) for date of 6-16-08 held before Judge James S. Moody, Jr., re: 85 Notice of appeal as to Charles Andrew Fowler. Court Reporter Sherrill L. Jackson, RPR, FPR, Telephone number 813/301-5041. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or purchased through the Court Reporter. Redaction Request due 4/8/2009, Redacted Transcript Deadline set for 4/20/2009, Release of Transcript Restriction set for 6/16/2009. (SJ) (Entered: 03/18/2009)
04/02/2009	119	TRANSCRIPT of Jury Trial Excerpt – Closing Arguments for date of 6/16/08 held before Judge James S. Moody, Jr., re: 85 Notice of appeal as to Charles Andrew Fowler. Court Reporter Sherrill L. Jackson, RPR, FPR, Telephone number 813/301-5041. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the

		deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or purchased through the Court Reporter. Redaction Request due 4/23/2009. Redacted Transcript Deadline set for 5/4/2009. Release of Transcript Restriction set for 7/1/2009. (SJ) (Entered: 04/02/2009)
05/01/2009	—	RECORD on appeal sent to USCA as to Charles Andrew Fowler re 85 Notice of appeal. Transmittal includes certified copy of docket sheet, PSI, volume of pleadings: 2 (1 Public/1 Sealed), volume of transcripts: 11, volume of exhibits: 1 expandable folder containing 1 Binder and paper exhibits. USCA number: 08-15463-EE (EJC) (Entered 05/01/2009)
05/12/2009	—	ACKNOWLEDGMENT by USCA as to Charles Andrew Fowler of receiving record on appeal (PSI, volume of pleadings: 2 (1 Public/1 Sealed), volume of transcripts: 11, volume of exhibits: 1 expandable folder containing 1 Binder and paper exhibits) on 5/5/09 re 85 Notice of appeal. USCA number: 08-15463-EE. (EJC) (Entered: 05/14/2009)

05/17/2010	124	MANDATE of USCA (certified copy) as to Charles Andrew Fowler re 85 Notice of appeal; affirmed. EOD: 4/14/10 Issued as Mandate: 5/13/10 USCA number: 08-15463-EE (DG) (Entered 05/17/2010)

United States Court of Appeals for the Eleventh Circuit
08-15463-EE
United States of America v. Charles Andrew Fowler

File Date	Entry
09/29/2008	DKT2(Docketing Notice) issued. To: Stephen M. Crawford; c: James Arthur Muench; c: Robert E. O'Neill; c: Sheryl L. Loesch
01/28/2009	Appellant Brief Filed: (Atty: Kenneth S. Siegel)
04/29/2009	Appellee Brief Filed: (Atty: Judy K. Hunt)
05/28/2009	Reply Brief Filed (Atty: Kenneth S. Siegel)
04/14/2010	Judgment Entered
04/14/2010	OPIN1 (Notice of issuance of opinion) issued. c:James S. Moody, Jr.; c:Jane R. Roth; c:Judy K. Hunt; c:Kenneth S. Siegel
04/14/2010	Opinion Issued
05/13/2010	CASE CLOSED – Mandate Issued
07/16/2010	Notice of Filing Certiorari – SC# 10-5443: (Atty: Kenneth S. Siegel)
11/15/2010	Certiorari Granted: (#10-5443)(Atty: Kenneth S. Siegel)
11/15/2010	Motion for leave to file in forma pauperis is GRANTED (#10-5443:)(Atty: Kenneth S. Siegel)

~~SEALED~~

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA	**CASE NO.**
	8:07-CR-380-T30 TGW **18 U.S.C. § 1512(a)(1)(C)**
v.	**18 U.S.C. § 1512(a)(3)(A)**
CHARLES ANDREW FOWLER, a/k/a "Man"	**18 U.S.C. § 1111 and 2** **18 U.S.C. § 924(c)(1)(A)** **18 U.S.C. § 924(j)(1)**

INDICTMENT

(Filed Sep. 19, 2007)

The Grand Jury charges:

COUNT ONE

On or about March 3, 1998, in the Middle District of Florida, the defendant,

CHARLES ANDREW FOWLER,
a/k/a "Man,"

with malice aforethought, did unlawfully, willfully, deliberately, maliciously, and with premeditation, kill Haines City Police Officer Christopher Todd Horner, by shooting Officer Horner in the head with a handgun, which killing is murder as defined by Title 18, United States Code, Section 1111, with the intent to prevent the communication by Officer Horner to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a federal offense, namely that:

(1) Associates of **CHARLES ANDREW FOWLER, a/k/a "Man,"** had earlier that morning robbed at gunpoint a Holiday Inn located in Dundee, Florida, in violation of Title 18, United States Code, Section 1951;

(2) **CHARLES ANDREW FOWLER, a/k/a "Man,"** and others had conspired to, and were conspiring to rob a bank later that morning, in violation of Title 18, United States Code, Sections 2113 and 371;

(3) **CHARLES ANDREW FOWLER, a/k/a "Man,"** and others had conspired to, and were conspiring to rob a bank later that morning, in violation of 18, United States Code, Section 1951;

(4) An associate of **CHARLES ANDREW FOWLER, a/k/a "Man,"** having previously been convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm which had been transported in interstate commerce in violation of Title 18, United States Code, Section 922(g);

(5) **CHARLES ANDREW FOWLER, a/k/a "Man,"** and others knowingly and intentionally possessed cocaine, a controlled substance, in violation of Title 21, United States Code, Section 844(a); and,

(6) **CHARLES ANDREW FOWLER, a/k/a "Man,"** and others knowingly and intentionally possessed marijuana, a controlled substance, in violation of 21, United States Code, Section 844(a)

All in violation of Title 18, United States Code, Sections 1512(a)(1)(C), 1512(a)(3)(A), 1111, and 2.

COUNT TWO

On or about March 3, 1998, in the Middle District of Florida, the defendant,

CHARLES ANDREW FOWLER,
a/k/a "Man,"

knowingly used and carried a firearm, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, to wit: conspiracy to commit robbery, in violation of Title 18, United States Code, Section 1951, and conspiracy to commit bank robbery, in violation of Title 18, United States Code, Sections 2113 and 371, and in the course of using and carrying said firearm, unlawfully, willfully, deliberately, maliciously, and with premeditation and malice aforethought, did kill Haines City Police Officer Christopher Todd Horner, by shooting Officer Horner with a firearm, which killing is murder as defined in Title 18, United States Code, Section 1111.

All in violation of Title 18, United States Code, Sections 924(c)(1)(A), 924(j)(1) and 1111(a) and 2.

A TRUE BILL,
/s/ Patricia Barfield
Foreperson

JAMES R. KLINDT
Acting United States Attorney

By: /s/ James A. Muench
JAMES A. MUENCH
Assistant United States Attorney

By: /s/ James C. Preston, Jr.
JAMES C. PRESTON, JR.
Assistant United States Attorney
Senior Deputy Chief, Narcotics

No.

UNITED STATES DISTRICT COURT

Middle District of Florida
Tampa Division

THE UNITED STATES OF AMERICA

vs.

CHARLES ANDREW FOWLER a/k/a "Man"

INDICTMENT

Violations:

18 U.S.C. § 1111
18 U.S.C. § 1951
18 U.S.C. §§ 2113 and 371
18 U.S.C. § 922(g)
21 U.S.C. § 844(a)
18 U.S.C. §§1512(a)(1)(C), 1512(a)(3)(A), 1111, and 2
21 U.S.C. §§ 924(c)(1)(A), 924(j)(1) and 1111(a) and 2

A true bill,

/s/ Patricia Barfield
Foreperson

Filed in open court this 19th day of September, 2007 A.D.

____
Clerk

Bail $______________

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:07-cr-380-T-30TGW

UNITED STATES OF AMERICA

-vs-

CHARLES ANDREW FOWLER,

Defendant. /

11 June 2008
9:15 a.m.
Courtroom 13A

VOLUME III

TRANSCRIPT OF PROCEEDINGS
(JURY TRIAL)
BEFORE THE
HONORABLE JAMES S. MOODY, JR.,
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

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ALSO PRESENT

CHARLES ANDREW FOWLER (Defendant)*
SARA BOSWELL (Courtroom Deputy Clerk)
FRANK DOHERTY (Court Security Officer)

(appearances continued on next page)
STENOGRAPHICALLY REPORTED
COMPUTER-AIDED TRANSCRIPTION

not present at the commencement of the proceedings

* * *

[106] A We were getting ready to commit the robbery that morning. We was planning it; put on our, you know, clothing and things like that, discussing it; and at the same time, we was doing drugs, listening to music, you know. We had both just committed a robbery. Like I was saying, we robbed Holiday Inn, and they robbed somewhere in Lake Wales. So, we felt, you know, good about it, said –

Q How do you know they robbed a place in Lake Wales?

A Because Charles Fowler told me (pointing), the man right there.

Q Did he tell you where he robbed in Lake Wales?

A He just say they committed a robbery that night.

Q Did he tell you what kind of robbery, whether it was a drug dealer, a commercial establishment, anything like that?

A No.

Q So, go on. You mentioned that you were – in addition to listening to music, you were doing drugs. What kind of drugs were being done out there?

A Cocaine and marijuana.

Q Were you also drinking?

A Yes, sir. We were drinking, too.

Q And specifically what were you using?

A I was drinking, and I think I was smoking some weed.

Q How about Charles Fowler?

A He was doing cocaine.

[107] Q Robert Winston?

A He was doing cocaine.

Q Now, how was it you could remember who was doing what?

A Because I look at things, you know, that I don't do and the things that they do. You know, when I would send them or they send me to get it, I know what they did, you know, and I know what I did; but I seen it. I was there, so I know what we was doing.

Q Did you – at this time in your life, were you using cocaine?

A No.

Q Is that one reason you could sit here and tell us you didn't use cocaine that night?

A Right, I didn't.

Q How about the others? Did they have their substances of choice that they would use on a regular basis?

A Yes, sir.

Q And Robert Winston, what was he into?

A Cocaine.

Q And Charles Fowler?

A Definitely cocaine.

Q And Andre Paige?

A Cocaine.

Q And Tick-Tock?

A He did a little bit of both, cocaine –

[108] Q Cocaine?

A Cocaine and weed.

Q So, tell us what happened as you were sitting out there. Did Robert Winston eventually come to your vehicle, the brown Oldsmobile?

A Yes. During that time, Charles Fowler got out of the car. When he got out of the car, it was, I'd say, a few minutes or somewhere like that when he got down there. Robert Winston got into the car; and Charles, he just like went towards the grove; but I know what he went to the grove area for. That's to do cocaine. You know – so they wouldn't see what he had, how much he had.

Q Why would he care if they knew he was using cocaine?

MR. CRAWFORD: Objection, calls for speculation.

THE COURT: Sustained. Lay a foundation, if you can.

BY MR. MUENCH:

Q What is your belief? Why is it you say he was going there to use cocaine?

A Because he didn't like to do it with them a lot. He like to have it all for hisself.

Q Did you folks not always share your substances?

A The majority of the time we didn't.

Q And is cocaine expensive?

A Yes.

[109] Q So, at times when people were using cocaine, would they move away from others so that they wouldn't share?

A Yes.

MR. CRAWFORD: Leading.

THE COURT: Overruled.

BY MR. MUENCH:

Q And is that your – basically your – what you believe he was doing out of the car?

A Yeah. I mean, I know that's what he was doing.

Q Okay. So, tell us what happened as he was out of the car and the four of you were in the brown Oldsmobile.

A Robert Winston was on the driver's side. That's the side Charles Fowler was driving when he got out of the car. I was on the passenger side. Andre Paige was on the passenger side in the back seat, and Jeffrey Bouyie was on the driver's side in the back seat.

So, at that time now, the four of us in the car, and we getting ready, and, you know, we talking about the robbery and listening to music; and at that time, it was a little bit before daybreak. Daybreak, like it was just starting to set in. In certain areas, areas we was in, it was foggy, but not all areas. So, you know, we just started doing what we had to do; and, you know, before I know it, and next thing I know, that's when the police pulled up, and he had his lights – he had his lights on us, the spotlight; and [110] then, you know, we got – we got nervous, because we had guns, drugs –

MR. CRAWFORD: I object to narrative testimony.

THE COURT: Overruled.

THE WITNESS: We had guns and masks and things in the car. So, I told him – I say, you know, "Everybody just stay cool like we always do, you know, when we doing a crime or something that." You know, we basically lie, you know.

So, the police got out of the car, and we got out of the car, you know; and he asked us what we was doing out here in the cemetery at that time. Only thing –

MR. CRAWFORD: Your Honor, I object and ask to approach sidebar if I could.

THE COURT: Same objection?

MR. CRAWFORD: Yeah, but I would like to expand on it.

THE COURT: I'll sustain the objection. Ask questions, please.

BY MR. MUENCH:

Q Tell us what you did and what Officer Horner did when he came into the cemetery.

A He pulled his gun out on us when he got out the car. He had his gun in his hand, and he had his flashlight on us and told us, "Don't move." And I said that I was out there in the cemetery visiting my auntie. I know it was early in [111] the morning; and besides that, I know he knew me from – he knew I did crimes. I was basically caught in the act at that time, that morning. I couldn't think of anything else to really say.

So, I knew we was in hot water then. We was pretty much caught, but I tried to, you know, make an excuse anyway, but that was something that he wasn't going for. I knew it then when he pull his gun, had his gun on us and his flashlight. So, he said that he was going to check and see if we had any warrants. He asked for our names.

MR. CRAWFORD: Again, I would object to the narrative of this testimony.

THE COURT: Ask questions, please.

BY MR. MUENCH:

Q What happened next?

A So, after that, when he was eventually starting to approach us – he never approached the car. He was making his way toward the cars. And the reason

I say that I believe he didn't, because it was four of us.

* * *

[114] Q Mr. Gamble, when we broke, you were describing Officer Horner's standing there with his flashlight pointed at you together with his gun, and you were trying to make an excuse as to your auntie was buried in the cemetery. Why were you trying to do that?

A At that time, Charles Fowler, you know – like I was saying, he could have left, but he didn't, because, for one, his cousin, Robert Winston, was out there; for two, he was keeping it real –

MR. CRAWFORD: Nonresponsive.

THE COURT: Sustained.

THE WITNESS: – you know.

BY MR. MUENCH:

Q Tell us about the conversation you had with Officer Horner as you were out there and what happened. What transpired?

A So, during the time, I knew – we knew and Charles Fowler knew –

MR. CRAWFORD: Objection, nonresponsive.

THE COURT: Sustained.

THE WITNESS: If the police –

[115] THE COURT: No. Sustain the objection. So, listen to the question and answer the question that's asked, please.

BY MR. MUENCH:

Q Please tell us – more importantly, tell the jury what Officer Horner said, what you said, and why you said what you said and what took place out there.

A When he asked me what I was doing out there, I told him I was out there visiting my auntie, but I know that, you know, he – he knowed that was a lie, early in the morning like that, you know, at that time. And then, like I say, by the clothing that we had on – I mean, it happened so fast, we didn't have time to throw the clothes off and look like regular people. We was going to rob a bank. So, it was evident. He sees all this black, you know. He knowed that something ain't right, and he knowed before that I was robbing; and the reason why I know that he knew is because he told me I don't have to live the life that I lived, I can change, I can be a better person.

Sooner or later, wrongdoing catch up with me a while back. He a police officer. The police officer knows the street just about.

Q Mr. Gamble, what were you guys wearing when you go out of the car?

A We were wearing black clothing.

[116] Q Were you wearing gloves?

A Yes, sir.

Q All of you?

A Yes.

Q Did you think that would look suspicious in summer in Florida?

A Yes, I knew it would for the simple reason, like I was saying, this – if we take off the gloves, then this lead to fingerprints, whether we're leaning against the car or whatever. It happened so fast – we had our lights on, first of all; we got the music on; we're in the car getting dressed. And the way you come in the cemetery coming from this way down –

Q (Changes overhead exhibit.)

A – what happened was he had to see us before we saw him. He had to see our headlights coming down the cemetery. So, evidently he must have had the headlights off so we couldn't see his headlights, but he couldn't see ours; and he cut his lights off and came around.

MR. CRAWFORD: Objection. Objection; speculation, nonresponsive, and narrative.

THE COURT: Overruled.

THE WITNESS: He came around the back way (pointing) around us, behind us, now not directly on our rear bumper, but, you know, in between, in the middle, you [117] know, a couple of distance. We had some distance – distance from him, and he hit his lights. He hit his red – you know, his lights on the top, his spotlight.

Q When you say that he went around earlier, you indicated where your vehicle was parked. Can you put a little dot there where your vehicle was parked?

A It was somewhere in the middle of the cemetery by the road, I believe, right there, somewhere in there.

Q Would it be about where this vehicle was parked or a little bit further down? Somewhere around here (pointing)?

A Somewhere around there, yes.

Q On the road?

A Yeah, on the road, though, but right by the cemetery.

Q Okay. And you indicated which direction was your vehicle facing?

A Our vehicle was facing out.

Q Facing in this direction, the direction my pen is pointing?

A We had it facing out. We always have a car, you know, the direction where we can getaway. We always have – you know, if we – if we had it this way going backwards, how can we get out the cemetery, you know.

Q Where did Officer Horner go? Where did his vehicle travel that it was able to pull up behind you? If you could just trace.

[118] A He had come straight this way. He couldn't come this way because he couldn't get in without blocking the cemetery, so he turned around. It was only one way in and one way out unless you go by the road area. That's why we couldn't park but one way. That's the way heading out.

Q Go on. You made a straight line. I want to continue where he traveled apparently to get behind you.

A (Points.)

Q And did you stop right where his vehicle stopped?

A It was somewhere around there, yeah.

Q Here (pointing)?

A Somewhere. Might have been a little closer up.

Q Okay. And why is it you thought he must have had his lights off when he pulled into the cemetery?

A Because it's not – it wasn't totally daybreak. It was kind of in between, and he had to have his lights off coming from the way that he came, because we would have seen him. We would have been able to see him come, "Oh, somebody coming. Let's go." We would have did something.

Q Why didn't you see him when he would have passed in front of your vehicle?

A Because, like I was saying earlier, we were getting ready and we was talking about what we was going to do, how we going to do it. We listening to music, doing drugs, and we were in the Oakland Cemetery. That part we were in, that [119] was kind of foggy. The fog was just starting to clear up. That's why I believe he had his fog light on us and all his lights.

Q You talking about after he pulled in behind you?

A Yes.

Q Now, you also mentioned that he knew you were a robber and had spoken to you earlier?

A Yes.

* * *

[129] Q So, returning to the Oakland Cemetery on March 3rd, did you recognize Officer Horner when he got out of the car?

A Yes, sir, I did.

Q Based upon his conversation with you, was there any indication whether he recognized you?

A Yes.

Q And what was that?

A I knew that he recognized me.

Q How did you know that?

A We made contact, you know. He asked me – he say what we was doing out here.

Q Now, I believe we left off with you were starting out of the vehicle with whom? Who else was out of the vehicle with you?

A I was out of the vehicle on the passenger side. Robert Winston was out of the vehicle on the driver's side. Andre Paige was out of the vehicle on the passenger side. And Tick-Tock, you know, Jeffrey Bouyie never got out of the car. He ducked down. He stayed in the car.

[130] Q Now, you were describing a conversation you were having with Officer Horner. Do you recall that?

A Yes, sir. I was telling him that we wasn't doing nothing, we was just getting ready to leave. I was there to see my deceased auntie that morning.

Q What did he say in response?

A That – I mean, I knew he knew it wasn't true, so he said, "Well, let me" – you know, that's something that most all the polices say, you know, that's – I guess to keep things calm. "Let me run a check on your name. Let me do a name check; and if everything okay, then y'all can go."

So, upon that time when he was fixing to do that, I seen – we seen – I seen how nervous he was, how nervous we was. So, he started backing up. Looked like he was trying to grab something or reach for something, but he was trying to ease back toward his car.

That's when I seen Charles come out from behind him – in back of him – the grove area behind him. That's when I started talking to him more trying to distract him, saying, "We ain't doing nothing. Why can't we just leave?" And he was like, "No, no. I'm going to check y'all's name first. I'm going to do a run-and-check. Stay right where you are."

See, the problem was, I feel if he, you know, would have –

MR. CRAWFORD: Objection, speculation and [131] narrative.

THE COURT: Sustained on narrative.

BY MR. MUENCH:

Q Tell us what happened after he said, "I'm just going to check out your names; and if everything's okay, I'll let you go."

A Being what the distance was between the cars, if he would have went back toward the car, we had time to get in the car and leave. We had time to jump in the car and leave, because the car was already running and the lights were on. I say the music was playing. All we had to do was just get in the car and leave.

So, I guess, you know, he was – he didn't want to leave us right there at the same time and didn't want to go back to his car, but he started making his way back to the car with his gun on us, I guess, to call for backup or, you know, something. That's when Charles came up from behind him, and Charles came up from behind him and grabbed the gun. When Charles grabbed the gun, we all – me, Robert Winston, and Andre Paige – we participated in, you know, containing him.

Q What did you, Andre Paige, and Winston do when Charles Fowler jumped him from behind?

A We helped get control of the gun.

Q How did you do that?

[132] A When it all happened – when it all happened, he didn't want to give up the gun; but at the same time, we ain't want to go to jail, you know. So, I tried to prevent anything from happening to him or anything from happening to us, so I said based on the fact that he knew me, "Look, you know, ain't nothing going to happen. Just give up the gun and don't resist." He wasn't no real scrubber once I said that, you know, "Just give up the gun," because I know it would have led to something else eventually.

So, he cooperated and gave the gun to Charles, which we – we basically had the gun, but he would not let the gun go for nothing until I said that.

And he said, "Chris, why are you doing this?"

When he said my name, that's when everything got out of control. They know he knew me, because I said earlier he stopped me a few times. He had a conversation with me, you know, talked to a criminal, trying to get me to change my life, you know. So, he knew me.

So, once he said that, that's when Charles said, "Oh, man, you know him? You know him? Oh, man, why? Now we can't walk away from this thing. So, if we do walk away from the scene, it's definitely Chris Gamble." That's what they thinking about, but my whole – my motive was –

MR. CRAWFORD: Judge, objection as to narrative and what others were thinking at the time.

[133] THE COURT: Sustained as to narrative. Break it up and ask questions, please.

BY MR. MUENCH:

Q What position were you in, the five of you as the four of you tried to wrestle Officer Horner's gun from him?

A I was in front of him. Charles was in back of him with his gun, the police gun. And after we took the gun from him but during taking the gun from him. Charles was in the back now towards the side with Andre Paige.

Charles had the gun. He had the gun. Charles – Andre Paige had his hand; Robert Winston had his hand; and I had my hand on his hand – on his arm like this (indicating). And I was talking to him telling him, just, you know, "Give up the gun" – "give up the gun. Ain't nothing going to happen," but like I was saying earlier –

Q Was he standing at that time, Officer Horner?

A He was like in between, because basically we were – we was overpowering him. It was four – it was three on one – you know, four on one, I mean.

Q Go on.

A So, he gave the gun up, and Charles ordered him, you know, get on his knees.

Q Did Officer Horner comply? Did he get on his knees?

A Yeah.

Q And what was happening when Officer Horner was on his [134] knees? Who had the gun?

A Charles Fowler had the gun, that man right there (pointing).

Q What happened while Officer Horner was on his knees? Tell us about the conversation you folks had with Officer Horner, as well as with each other.

A So, at that time, Charles got the gun pointed in the back of his head telling him not to move, and I'm talking to Charles and telling everybody, "Listen, just be calm. I got this."

I said, "Look, ain't nothing going to happen to you."

When he said my name, though, Charles said, "Man, he know you." Like I say, you know, if anything happened, it automatically lead to me if we take his gun, you know, and leave; but the thing is, I been keeping it real all my life, you know, like as far as me and somebody committing crimes together, I always take the weight.

Q What do you mean "take the weight" when you commit crimes with other people?

A Well, if something happens – like the Shoney's robbery, me and Andre Paige and Tick-Tock did that. Polk County Sheriff came and arrested me. I didn't – they put me in the interrogation room, and Morris West was there, you know, while they talked to me and asked me – and, as a matter of fact, during that time, Morris West asked me [135] again, now that I think about it, do I know anything about why the police there. He said that he believe I knew something about it; and at that time, I lied because I've got to say I was living that type of life, living, you know, a thug life. So, I ain't, you know – thugs don't comply with the law.

But, anyway –

Q So, when you were out in the cemetery after Officer Horner was on his knees and said, "Chris, why you doing this?" what were you trying to convey to your buddies out there? What was it you were trying to convey would happen if they just let you decide – just take the gun and leave him?

A Yeah, I'd like to just say this: It's wrong, and I apologize. What I done in society, you know, robbing, and things of that nature –

MR. CRAWFORD: Nonresponsive.

THE COURT: All right, Mr. Gamble, answer the question, please.

THE WITNESS: I wanted to take his gun and his keys so he couldn't follow us or, you know, try to pull up in his – you know, put up a struggle and we leave the cemetery. He didn't know them. He knowed me because of run-ins, Hilltop, being driving the car without a license. So, the police coming to get me as unusual. Once they come [136] and get me, "I don't know what you talking about.

"Yeah, it was you. You know what happened.

"No, man, I don't know what happened."

And I know it was my word against the police officer's word. Nobody else there. You know, I know that I'm going to jail; but as I go to jail, I'm not going to say anything, and I'm going to go to trial saying that I know nothing by myself, not saying that man right there was there, Robert Winston, Andre Paige, or Jeffrey Bouyie; just Christopher Gamble. I'm going to take the weight like I took in '99.

Q Is that what it means to be a – a true thug?

A Yes, sir, that what it means.

Q Is to be a thug the equivalent to be a gangster – real gangster, you don't rat?

A Yes, sir. Yes, sir.

Q So, return, please, to Officer Horner's on his knees, Charles Fowler has the gun, and you're having this discussion. Tell the jury what happened.

A So, as we were having this discussion, I – I told him, "Let me do things, you know, my way. Just let me handle the situation."

And the minute, you know, he started calling out my name saying, "Chris, why you doing this? Please don't do this" –

* * *

[137] Q Go on and tell us what happened while you were out there, picking up from where you left off.

A After that, once he said my name and I tried to – I told Charles Fowler to give me the gun, you know, "We are [138] going to do this, you know, my way. Let me handle that." that's when Tick-Tock screamed out the window and told him to kill that cracker. And he shot him in the back of the head.

Q What position was Officer Horner in when he was shot in the back of the head?

A He laid face down into the — you know, the grass.

Q Talking about as he was shot?

A Oh, he was shot in the back of the head.

Q Was he standing, or was he still kneeling?

A No. He was on his knees, and he fell straight forward.

Q And tell us what happened then.

A He shot him. He wanted to keep the gun.

Q Who wanted to keep the gun?

A Charles Fowler. And I said, "No." The reason why, you know, you take the police gun and it — it's definitely trouble, definitely more problems. So, I told him no. I take the gun from him, and I — like I said numerous times, based on the fact that he did that, I wanted to shoot him, because that's — that's something that I didn't want to do. I came to commit a robbery that morning, you know.

* * *

[143] Q In describing what happened at the cemetery, at one point Officer Horner was backing up toward his vehicle and grabbing for something?

A Yeah. I — I think it was a — probably his, you know, dispatch or something. He was trying to grab something, I think walkie-talkie or something. I'm not sure, but I guess [144] when he realized he didn't have it or something, he wanted to try to make his way to the car, backing up; but like I said, there was a little distance between us. If he get too far, we have little chance to escape.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:07-cr-380-T-30TGW

UNITED STATES OF AMERICA

-vs-

CHARLES ANDREW FOWLER,

Defendant.

12 June 2008
9:10 a.m.
Courtroom 13A

VOLUME IV

TRANSCRIPT OF PROCEEDINGS
(JURY TRIAL)
BEFORE THE HONORABLE
JAMES S. MOODY, JR.,
UNITED STATES DISTRICT COURT JUDGE

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ALSO PRESENT

CHARLES ANDREW FOWLER (Defendant)
SARA BOSWELL (Courtroom Deputy Clerk)
FRANK DOHERTY (Court Security Officer)

(appearances continued on next page)

STENOGRAPHICALLY REPORTED
COMPUTER-AIDED TRANSCRIPTION

* * *

[224] MR. CRAWFORD: We would move pursuant to the appropriate rule for judgment of acquittal. We believe the Government's entire case is based on the credibility of Christopher Gamble and that – and that you have the right at this time to make a credibility determination, and we would respectfully request that you grant the motion at this time.

THE COURT: Denied.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:07-cr-380-T-30TGW

UNITED STATES OF AMERICA

-vs-

CHARLES ANDREW FOWLER,

Defendant.

16 June 2008
8:45 a.m.
Courtroom 13A

VOLUME V

TRANSCRIPT OF PROCEEDINGS
(JURY TRIAL)
BEFORE THE HONORABLE
JAMES S. MOODY, JR.,
UNITED STATES DISTRICT COURT JUDGE

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SARA BOSWELL (Courtroom Deputy Clerk)
FRANK DOHERTY (Court Security Officer)

(appearances continued on next page)

STENOGRAPHICALLY REPORTED
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* * *

[149] THE COURT: The jury instructions all right?

MR. MUENCH: Yes, sir.

MR. CRAWFORD: Thank you, Your Honor.

THE COURT: All right. Bring in the jury, please.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:07-cr-380-T-30TGW

UNITED STATES OF AMERICA

-vs-

CHARLES FOWLER,

Defendant.

16 June 2008
1:30 p.m.
Courtroom 13A

TRANSCRIPT OF PROCEEDINGS
(EXCERPT OF JURY TRIAL – ALL CLOSING ARGUMENTS)
BEFORE THE HONORABLE JAMES S. MOODY, JR., UNITED STATES DISTRICT COURT JUDGE

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(appearances continued on next page)

STENOGRAPHICALLY REPORTED
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[94] MR. CRAWFORD: Your Honor, I need to renew a [95] motion that I made at the conclusion of the Government's case.

THE COURT: All right.

MR. CRAWFORD: I so do.

THE COURT: All right, and it's denied.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:07-cr-380-T-30TGW

UNITED STATES OF AMERICA,

-vs-

CHARLES FOWLER,

Defendant. /

16 June 2008
4:40 p.m.
Courtroom 13A

TRANSCRIPT OF PROCEEDINGS
(EXCERPT OF JURY TRIAL – JURY CHARGE)
BEFORE THE HONORABLE
JAMES S. MOODY, JR.,
UNITED STATES DISTRICT COURT JUDGE

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(appearances continued on next page)

STENOGRAPHICALLY REPORTED
COMPUTER-AIDED TRANSCRIPTION

* * *

[3] PROCEEDINGS

(4:40 PM)

****

THE COURT: Members of the jury, it is now my duty to instruct you on the rules of law that you must follow and apply in deciding this case. When I finish, you will go to the jury room and begin your discussions, what we call your "deliberations."

It will be your duty to decide whether the Government has proved beyond a reasonable doubt the specific facts necessary to find the Defendant guilty of the crime charged in the indictment. You must make your decision only on the basis of the testimony and other evidence presented during the trial, and you must not be influenced in any way by sympathy or prejudice for or against the Defendant or the Government.

You must also follow the law as I explain it to you, whether you agree with that law or not; and you must follow all of my instructions as a whole. You may not single out or disregard any of the Court's instructions on the law.

The indictment or formal charge against any defendant is not evidence of guilt. Indeed, every defendant is presumed by the law to be presumed innocent. The law does not require a defendant to prove innocence or to produce any evidence at all.

[4] The Government has the burden of proving a defendant guilty beyond a reasonable doubt; and if it fails to do so, you must find that defendant not guilty.

You must make your decision only on the basis of the testimony and other evidence presented here during the trial, and you must not be influenced in any way by either sympathy or prejudice.

And if a defendant elects not to testify, you cannot consider that in any way in your deliberations. Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that a defendant's guilt proved be proved beyond all possible doubt. It is only required that the Government's proof exclude any reasonable doubt concerning the defendant's guilt.

A "reasonable doubt" is a real doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. "Proof beyond a reasonable doubt" therefore is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

If you are convinced that the defendant has been proved guilty beyond a reasonable, say so. If you are not convinced, say so.

As I said earlier, you must consider only the [5] evidence that I have admitted in the case.

The term "evidence" includes the testimony of the witnesses and the exhibits admitted in the record.

Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of evidence that controls. What the lawyers say is not binding upon you. Also, you should not assume from anything I may have said that I have any opinion concerning any of the issues in this case.

Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision concerning the facts.

In considering the evidence, you may make deductions and reach conclusions which reason and common sense lead you to make, and you should not be concerned about whether the evidence is direct or circumstantial.

"Direct evidence" is the testimony of one who asserts actual knowledge of a fact such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove or disprove any fact in dispute.

The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the [6] evidence as true or accurate. You should decide whether you believe what each witness had to say and how important that testimony was. In making that decision, you may believe or disbelieve any witness in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness, I suggest that you ask yourself a few questions.

Did the witness impress you as one who is telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness' testimony differ from other testimony or other evidence?

There may also be evidence tending to show that a witness has a bad reputation for truthfulness in the community where the witness resides or has recently resided or that others have an unfavorable opinion of the truthfulness of the witness. You may consider those matters also in deciding whether to believe or disbelieve such a witness.

[7] The testimony of some witnesses must be considered with more caution than the testimony of other witnesses. In this case, the Government called as one of its witnesses a person with whom the Government has entered into a plea agreement, providing for the possibility of a lesser sentence than the witness would otherwise be exposed to. Such plea bargaining, as it is called, has been approved as lawful and proper and is expressly provided for in the rules of this Court.

However, a witness who hopes to gain more favorable treatment may have a reason to make a false statement because the witness wants to strike a good bargain with the Government.

So, while a witness of that kind may be entirely truthful when testifying, you should consider such testimony with more caution than the testimony of other witnesses.

And, of course, the fact that a witness has pled guilty to the crime charged in the indictment is not evidence in and of itself of the guilt of any other person.

A witness who was using addictive drugs during the time he or she testified about may have an impaired memory concerning the events that occurred during that time.

Also, a witness who has been promised that he or she will not be charged or prosecuted or a witness who hopes to gain more favorable treatment in his or her own case may [8] have a reason to make a false statement because the witness wants to strike a good bargain with the Government. So, while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses.

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field is permitted to state an opinion concerning those technical matters. Merely because such a witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

You should also ask yourself whether there was evidence tending to prove that a witness testified falsely concerning some important fact or whether there was evidence that at some other time a witness said or did something or failed to say or do something which was different than the testimony the witness gave before you during the trial.

The fact that a witness has been convicted of a felony offense or a crime involving dishonesty or false statement is another factor you may consider in deciding whether you believe that witness.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the [9] witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether it was simply an innocent lapse of memory or intentionally a falsehood, and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

At this time, I will explain the indictment, which charges two separate offenses called "counts." I will not read it to you at length, because you will be given a copy of the indictment for reference during your deliberations.

Count 1 charges the Defendant killed a witness in violation of 18 USC, Section 1512(a)(1)(c). Count 2 charges that the Defendant used a firearm during and in relation to a crime of violence to kill another in violation of 18 USC, Section 924(c)(1).

I will explain the law governing those offenses in a moment. You will note that the indictment charges that the offense or offenses were committed on or about a certain date. The Government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the Government proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

[10] The word "knowingly" as that term is used in the indictment or in these instructions means that the act was done voluntarily and intentionally and not because of mistake or accident.

The word "willfully" as that term is used in the indictment or in these instructions means that the act was committed voluntarily and purposely with a specific intent to do something that the law forbids, that is, with bad purpose either to disobey or disregard the law.

Title 18 United States Code, 1512(a)(1)(C), makes [illegible] a federal crime or offense for anyone to kill or attempt to kill another person with intent to prevent that person from communicating information relating to the commission or possible commission of a federal offense to a law-enforcement officer or judge of the United States.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt: First, that the Defendant killed Christopher Todd Horner as charged and, second, that the Defendant killed Christopher Todd Horner knowingly and willfully with the intent to prevent him from communicating information relating to the commission or possible commission of a federal offense to a law enforcement officer or a judge of the United States.

The Government alleges that the killing of [11] Christopher Todd Horner was done to prevent Christopher Todd Horner from communicating information relating to the commission or possible commission of a federal offense to a law-enforcement officer or judge of the United States.

Specifically, the Governments [sic] alleges that the killing was done to prevent the communication by Christopher Todd Horner of information relating to one or more of the following federal offenses: One, the robbery of a Holiday Inn in violation of Title 18 U.S.C, Section 1951; two, a conspiracy to rob a bank in violation of Title 18 United States Code, Sections 1951, 2113, and 371; three, the possession of a firearm by a convicted felon in violation of Title 18 United States Code, Section 922(g); and/or four, possession of a controlled substance in violation of Title 18 United States Code, Section 844(a).

I will instruct you generally on the law as it relates to each of those crimes, although the Defendant is not charged with committing any of those offenses.

18 U.S.C., Section 1951(a), makes it a federal crime or offense for anyone to obtain or take the

property of another by robbery and in so doing, to obstruct, delay, or affect commerce or the movement of articles in commerce. A person can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt: First, that the person knowingly obtained or took the [12] personal property of another or from the presence of another as charged; second, that the person took the property against the victim's will by means of actual or threatened force or violence or fear of injury, whether immediately or in the future; and, third, that as a result of the person's actions, commerce or an item moving in commerce was delayed, obstructed, or affected in any way or degree.

The term "property" includes money or other tangible things of value.

The term "fear" means a state of anxious concern, alarm, or apprehension of harm.

While it is not necessary to prove that the person specifically intended to affect commerce, it is necessary that the Government prove that the natural consequences of the robbery would be to delay, interrupt, or adversely affect interstate commerce, which means the flow of commerce or business activities between a state at any point outside of that state.

You are instructed that the requisite effect upon commerce would be satisfied if the Holiday Inn described in the indictment was formed for the purpose of doing business both within and without the state of

Florida and actually did business outside the state of Florida.

Likewise, you may find that the requisite effect upon commerce has been proved if you find beyond a [13] reasonable doubt that the Holiday Inn described in the indictment served patrons who had traveled to Florida from outside the state of Florida.

Title 18 United States Code, Section 2113(a), makes it a federal crime or offense for anyone to take or attempt to take from the person or presence of someone else by intimidation any property or money in the possession of a federally insured bank. A person can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt: First, that the person knowingly took from the person or presence of – or the presence of another money or property then in the possession of a federally insured bank as charged and, second, that the person did so by means of intimidation.

A "federally insured bank" means any bank that [sic] deposits of which are insured by the Federal Deposit Insurance Corporation.

"To take by means of intimidation" is to say or do something in which – is to say or do something in such a way that a person of ordinary sensibilities would be fearful of bodily harm.

Title 18 United States Code, Section 371, makes it a separate federal crime or offense for anyone to conspire or agree with someone else to do something which if actually carried out would amount to another federal crime or [14] offense.

So, under this law, a conspiracy is an agreement or a kind of partnership in criminal purposes in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense it is not necessary for the Government to prove that all of those who were members of the scheme had entered into any formal type of agreement or that the members had planned together all of the details of the scheme.

Also, because the essence of a conspiracy offense is the making of the agreement itself, it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

What the evidence must show beyond a reasonable doubt is, first, that two or more persons in some way or manner came to a mutual understanding to try to accomplish a common and unlawful plan and second, that the Defendant, knowing the unlawful purpose of the plan, willfully joined in it.

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme and without knowing who all of the other members are. So, if a defendant has a general understanding of the unlawful purpose of a plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict that [15] defendant for conspiracy even though the defendant did not participate before and even though the defendant played only a minor part.

Of course, mere presence at the scene of a transaction or event or the mere fact that certain persons may have associated with each other and may have assembled together and discussed common aims and interests does not, standing alone, establish proof of a conspiracy.

Also, a person who has no knowledge of a conspiracy but who happens to act in a way that advances some purpose of one does not thereby become a conspirator.

Title 844(a) makes it a federal crime or offense for anyone to possess a controlled substance. Cocaine and marijuana are controlled substances within the meaning of the law. A person can be found guilty of that offense only if it is proved beyond a reasonable doubt that the person knowingly and willfully possessed a controlled substance.

Title 18 United States Code, Section 922(g), makes it a federal crime or offense for anyone who has been convicted of a felony offense to possess any firearm in or affecting interstate or foreign commerce. A person can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt: First, that the person knowingly possessed a firearm in or affecting interstate or foreign commerce and, second, that before the [16] person possessed the firearm, the person had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense.

The term "firearm" means any weapon which is designed to or may readily be converted to expel a projectile by the action of an explosive, and the term includes the frame or receiver of any such weapon or any firearm muffler or firearm silencer.

The term "interstate commerce" includes the movement of a firearm between any place in one state and any place in another state.

It is not necessary for the Government to prove that the person knew that the firearm had moved in interstate commerce before the person possessed it, only that it had made such movement.

The term "foreign commerce" includes the movement of a firearm between any place in one nation and any place in another nation. It is not necessary for the Government to prove that the person knew that the firearm had moved in foreign commerce before the person possessed it, only that it had made such movement.

The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may also have sole possession or joint possession. A person who knowingly has direct physical [17] control of something is then in actual possession of it. A person who is not in actual possession but has both the power and the intention to later take control over something either alone or together with someone else is in constructive possession of it.

If one person alone has possession of something, that possession is sole. If two or more persons share possession, such possession is joint.

Whenever the word "possession" has been used in these instructions, it includes constructive as well as actual possession and also joint as well as sole possession.

Title 18 United States Code, Sections 924(c)(1)(A) and 2924(j)(1), makes it a federal crime or offense for anyone to use a firearm during and in relation to a crime of violence to kill a person.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt: First, that the Defendant or person who aided or abetted committed a federal crime of violence, namely, conspiracy to commit robbery and/or conspiracy to commit bank robbery; second, that during and in relation to the commission of one or more of those offenses, the Defendant knowingly used a firearm as charged; and, third, that the Defendant used the firearm to unlawfully, willfully, deliberately, maliciously, and with premeditation [18] and malice aforethought kill a person, said homicide constituting murder within the meaning of 18 U.S.C., Section 1111(a).

"To kill with malice aforethought" means an intent at the time of the killing to take the life of another person, either deliberately and intentionally or to willfully act with callus and wanton disregard for human life.

The Government need not prove that the Defendant or the person he aided or abetted hated the person killed or felt ill will toward the victim at the time, but the evidence must establish beyond a reasonable doubt that the Defendant or the person he aided or abetted acted either with the intent to kill or to willfully do acts with callus and wanton disregard for the consequences in which the Defendant or the person he aided or abetted knew would result in a serious risk of death or serious bodily harm.

Killing with premeditated intent is required in addition to prove malice aforethought in order to establish the offense of first-degree murder.

Premeditation is typically associated with killing in cold blood and requires a period of time in which the accused or the person he aided or abetted deliberates or thinks the matter over before acting. The law does not specify or require any exact period of time that must pass [19] between the formation of the intent to kill and the killing itself. It must be long enough for the killer, after forming the intent to kill, to be fully conscious of that intent.

The term "firearm" means any weapon which is designed to or may readily be converted to expel a projectile by the action of an explosive, and the term includes the frame or receiver of any such weapon or any firearm, muffler, or firearm silencer.

The guilt of a defendant in a criminal case may be proved without evidence that the defendant personally did every act involved in the commission of the crime charged. The law recognizes that ordinarily anything a person can do for one's self may also be accomplished through direction of another person as an agent or by acting together with or under the direction of another person or persons in a joint effort.

So, if the acts or conduct of an agent, employee, or other associate of the defendant are willfully directed or authorized by the defendant or if the defendant aids and abets another person by willfully joining together with that person in the commission of a crime, then the law holds the Defendant responsible for the conduct of that other person just as though the Defendant had personally engaged in such conduct.

[20] However, before any defendant can be held criminally responsible for the conduct of others, it is necessary that the defendant willfully associate in some way with the crime and willfully participate in it. Mere presence at the scene of a crime and even knowledge that a crime is being committed are not sufficient to establish the defendant either directed or aided and abetted the crime. You must find beyond a reasonable doubt that the defendant was a willful participant and not merely a knowing spectator.

Evidence has been introduced tending to establish an alibi that the Defendant was not present at the time when or at the place where the Defendant is alleged to have committed the offense charged in the indictment.

It is, of course, the Government's burden to establish beyond a reasonable doubt each of the essential elements of the offense, including the involvement of the Defendant; and if after consideration of all the evidence in the case, you have a reasonable doubt as to whether the Defendant was present at the time and place as alleged in the indictment, you must find the Defendant not guilty.

In this case, you have been permitted to take notes during the course of the trial; and most of you, perhaps all of you, have taken advantage of that opportunity and have made notes from time to time.

[21] You will have your notes available to you during your deliberations, but you should make use of them only as an aid to your memory. In other words, you should give not your notes any precedence over your independent recollection of the evidence or the lack of evidence, and neither should you be unduly influenced by the notes of other jurors. I emphasize that your notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been.

A separate crime or offense is charged in each count of the indictment. Each charge and the evidence pertaining to it should be considered separately. The fact that you may find the Defendant guilty or not guilty as to one of the offenses charged should not affect your verdict as to any other offense charged.

I caution you, members of the jury, that you are here to determine from the evidence in this case whether the Defendant is guilty or not guilty. The Defendant is on trial only for those specific offenses alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the Defendant is convicted, the matter of punishment is for the Judge alone to determine later.

Any verdict you reach in the jury room, whether [22] guilty or not guilty, must be unanimous. In other words, to return a verdict, you must all agree. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of us must decide the case for yourself, but only after full consideration of the evidence with other members of the jury. While you are discussing the case, do not hesitate to re-examine your own opinion and change your mind if you become convinced that you were wrong, but do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember that in a very real way you are judges, judges of the facts. Your only interest is to seek the truth from the evidence in the case.

When you go to the jury room, you should first select one of your members to act as your foreperson.

The foreperson will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience. This is the verdict form that you'll have with you back in the jury room, and it's basically two questions. It says, "We, the jury, find as follows:

Number 1, as to Count 1 of the indictment charging [23] the offense of killing a witness in violation of 18 U.S.C., Sections 1512(a)(1)(C), 1512(a)(3)(A), and 1111 and 2, we, the jury, find the Defendant, Charles Andrew Fowler" – and it's got a place for you to answer that question – "guilty" with a blank and "not guilty" with a blank – and you answer the question.

"Number 2, as to Count 2 of the indictment charging the offense of knowingly using a firearm during and in relation to a crime of violence to kill another in violation of" – and there's several statute numbers – "we, the jury, find the Defendant, Charles Andrew Fowler guilty," with a blank, or, "not guilty" with a blank; and you answer that question.

Then you date the verdict, "So say we all this ___ day of June, 2008," and the foreperson signs it.

When you've reached a verdict, if you'll knock on your door, Frank will be outside the door at all times, and he'll answer the door, and you'll say, "We've reached a verdict." He'll shut the door, and then he'll notify me, and we'll notify the parties and gather everybody back in the courtroom, which may take us ten or 15 minutes or so to get everybody back in the courtroom. Then Frank will come get you from the jury room and bring you back to the courtroom to return your verdict.

If you have a question that comes up during your [24] deliberations, follow a similar procedure: Write down the question on a piece of yellow legal paper that you got in your pads; number it as your first question, second question, or third question; and knock on the door. Frank will answer the door, and you'll say, "We have a question." You'll hand him the question, and he'll shut the door. He'll bring the question to me. But if you can continue deliberating while you await the answer, please continue deliberating.

The reason is that when Frank brings me the question, I've got to read it and see if I think it's one that we can answer. Some questions, just like some questions that are asked here in this courtroom, under our rules are not allowed to be answered – answered, and your question may or may not be allowed to be answered. But if it is one that I can answer, I have to gather the parties back together, and that may take me ten or 15 minutes to get them back in the courtroom, show them the question. I then try to get the lawyers to agree upon an answer. You – you can probably imagine that that might take me some time. If I can't get them to agree, then I have to come up with an answer myself. I'll write the answer – generally I'll write the answer on a piece of paper, send it back to you with Frank, or I may call you back here into the courtroom and give you an answer or read a jury instruction, or my [25] answer may be, "Please re-read Jury Instruction ___."

Anyway, that may take me 30 or 40 minutes to get a question back to you. So, if you can keep deliberating, please do so.

Do any of you have any questions that you want to ask me before you retire?

(No response.)

THE COURT: Well, it's ten minutes after 5. Once you do retire to consider your verdict, you'll be on your time. You'll decide when you want to quit for the day. You decide when you want to come back the next morning. You decide what breaks you want to take in the morning and the afternoon, and you decide about lunch breaks.

So, it would be up to you to decide what time you want to break today. I would suggest we not go beyond 6. But if you want to stop immediately, you stop immediately; but I'm going to ask that you not go beyond 6.

Miss Gunning and Miss Raether, the two of you are alternates; and even though you've sat during – in this trial for more than a week and you've heard the riveting instructions on the law that I've read to you, you don't get to join in the deliberations unless something happens to one of the jurors and they are discharged.

You may wonder if that's the case why you had to sit here from – what? – 1:30 on and listen to the closing [26] arguments and listen to these instructions on the law. The reason is that if you're called upon to substitute for one of the jurors – and I have had a case before where I had to call on one of the alternates to substitute for a juror that was dismissed during deliberations – if you had not heard the closing arguments and the instructions on the law, we would have to start all over with the closing arguments, and I'd have to read the instructions on the law all over again.

So, if I have to call upon you now, we won't have to do that. The jury will have to begin their deliberations all over, but that's not nearly as bad as everybody having to listen to the closing arguments and my reading of these instructions again.

I'm going to ask the two of you if you would please leave a telephone number where, if Sara has to get you to substitute and fill in, she can get you on short notice. You do not need to come to the courthouse tomorrow, assuming that the jury comes back tomorrow. If we need you, I'll call you, and we'll try to get you back as soon as we can.

Okay. If there are no questions, you may retire to start your deliberations; and it's up for you to decide if you've had enough for today and just want to come back tomorrow morning.

COURT SECURITY OFFICER: All rise.

[27] THE COURT: You will have with you in the jury room all the items that were received in evidence except guns. I don't know if any gun is in evidence or not, but those are kept in here. And I'll send you copies of the instructions on the law; and, of course, you'll have several copies of the verdict form.

* *

(Excerpt concluded.)

- - - - -

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-15463

D. C. Docket No. 07-00380-CR-T-30-TGW

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES ANDREW FOWLER,
a.k.a. Man,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(April 14, 2010)

Before EDMONDSON, BARKETT and ROTH,* Circuit Judges.

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* Honorable Judge Jane R. Roth, United States Circuit Judge for the Third Circuit, sitting by designation.

BARKETT, Circuit Judge:

Charles Andrew Fowler appeals his conviction for murder with the intent to prevent a person from communicating information about a federal offense to a federal law enforcement officer or judge of the United States, in violation of 18 U.S.C. § 1512(a)(1)(C). Fowler argues that the government failed to present sufficient evidence to support his conviction. We affirm.

I. BACKGROUND

In March 1998, Christopher Gamble, Jeffrey Bouyie, and Andre Paige robbed a Holiday Inn in Dundee, Florida. They then decided they would rob a NationsBank the next morning, and they recruited Fowler and Robert Winston to help them. Fowler and Winston had a stolen Oldsmobile that they used to surveille the bank and that they intended to use in the robbery. After surveilling the bank, they retrieved guns, masks, and gloves, and went to the Oakland Cemetery to prepare for the bank robbery. After concocting their plan, the five men donned black clothing and started drinking, taking drugs, and listening to music. Shortly before daybreak, Fowler left the car to use cocaine, because he did not want the others to see how much he had.

While Fowler was away, Haines City Police Officer Todd Horner drove up behind the stolen Oldsmobile and shone its spotlight at the car and its occupants. The Oakland Cemetery was known as a high-crime area, particularly for drug trafficking, and as a place for leaving stolen cars. Officer Horner called the Haines City police dispatcher and reported that he was going to investigate a suspicious vehicle. He approached the group and told them not to move.

At trial, Gamble testified that Officer Horner then pulled out a gun and told the group to give him their names so that he could check for outstanding warrants. At that point, Fowler snuck up behind Officer Horner and Gamble started talking to Officer Horner to distract him. Once Fowler was directly behind Officer Horner, Fowler grabbed Officer Horner's gun and Gamble, Winston, and Paige helped Fowler gain control of it. At trial, Gamble explained that they had subdued Officer Horner because "by the clothing that we had on – I mean it happened so fast, we didn't have time to throw the clothes off and look like regular people. We was [sic] going to rob a bank. So, it was evident. He sees all this black, you know. He knowed [sic] that something ain't right, and he knowed [sic] before that I was robbing." Because it was spring in Florida, it was suspicious that all of the occupants were wearing black clothes and gloves.

Gamble told Officer Horner to relinquish the gun and that nothing would happen to him. Officer Horner then gave Fowler the gun and asked Gamble, "Chris, why are you doing this?" Gamble testified that when Officer Horner called him by his first name, the rest of the group lost control and "went a little crazy," and Fowler stated that they would not be able to "walk away from this thing."

Fowler told Officer Horner to get on his knees. Gamble told Fowler to calm down and to give him the gun. Gamble reminded Fowler that Officer Horner knew only Gamble's name; if anything happened, Gamble would handle it and nothing would happen to Fowler. In the midst of the conversation, Bouyie yelled from the car, "kill that cracker," and Fowler shot Horner in the back of the head.

Gamble was later arrested and convicted for robbing an ABC Liquor Store in 1999 and was sentenced to 20 years' imprisonment in a state prison. In March 2002, while serving his sentence, Gamble called Polk County law enforcement officials and told them he had robbed the Holiday Inn the night that Officer Horner was killed. He eventually told them that Fowler had murdered Horner. Gamble subsequently pled guilty to federal crimes, including the Holiday Inn robbery, and received a life sentence with a consecutive sentence of 107 years' imprisonment.

In 2007, Fowler was indicted for murdering Officer Horner with the intent to prevent Horner from communicating information about a federal offense[1] to a federal law enforcement officer or judge of the United States, in violation of 18 U.S.C. § 1512(a)(1)(C) ("Count 1").[2] The jury found Fowler guilty on both counts, and the court sentenced him to life imprisonment for Count 1 and ten years' imprisonment for Count 2, which were to run consecutively.

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[1] The federal offenses that Fowler is alleged to have tried to conceal were: (1) the robbery of a Holiday Inn in violation of 18 U.S.C. § 1951; (2) conspiracy to commit bank robbery in violation of 18 U.S.C. §§ 371 and 2113; (3) conspiracy to commit robbery in violation of 18 U.S.C. §§ 371 and 1951; (4) possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g); and (5) possession of cocaine and marijuana in violation of 21 U.S.C. § 844.

II. DISCUSSION

In relevant part, 18 U.S.C. § 1512(a)(1)(C) provides that it is a federal criminal offense to "kill[ ] . . . another person, with intent to . . . prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense. . . ."[3] Thus, for the government to prove a violation of § 1512(a)(1)(C) it must show: (1) the defendant knowingly and willfully killed a person; and (2) the defendant killed the person with the intent to prevent the communication of information "relating to the commission or possible commission of a [f]ederal . . . offense. . . ." 18 U.S.C. § 1512(a)(1)(C).

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[2] Fowler was also indicted for knowingly using and carrying a firearm, during and in relation to a crime of violence for which he could be prosecuted in a federal court, in violation of 18 U.S.C. §§ 924(c)(1)(A) and (j)(1), 1111(a), and 2 ("Count 2").

[3] We view the evidence in the light most favorable to the government, and all "reasonable inferences and credibility determinations are drawn in favor of the verdict." *United States v. Simpson,* 228 F.3d 1294, 1299 (11th Cir. 2000). A verdict of guilty cannot be disturbed "unless no trier of fact could have found guilt beyond a reasonable doubt." *United States v. Lyons,* 53 F.3d 1198, 1202 (11th Cir. 1995).

There is no question that Fowler killed Officer Horner with the intent to prevent his further investigation and discovery of the group's criminal activities. Fowler argues, however, that no evidence was presented either that: (1) it was likely that there would be a *federal* investigation of any of the federal crimes involving Fowler and his group; or (2) it was likely that the information Officer Horner might have obtained *would have been* transferred to a federal officer or federal judge by Officer Horner. Thus, Fowler contends the government failed to prove the federal nexus to the murder, which is an essential element of a violation of § 1512(a)(1)(C). Fowler misperceives the requirements of the statute.

Nothing in § 1512(a)(1)(C) requires proof that a federal investigation is ongoing, imminent, or likely. To the contrary, the statute explicitly provides that the murder must have been intended to prevent communication relating to the "*possible* commission" of a federal offense. *Id.* (emphasis added). Fowler's sufficiency argument is based on his incorrect assertion that the federal nexus required by § 1512(a)(1)(C) requires proof that the *victim* would have likely communicated information relating to the possible commission of a federal offense to federal authorities. In construing the statute this way, Fowler focuses on the victim's state of mind instead of, as the statute requires, the *defendant's* state of mind. His approach has been rejected by the majority of our sister circuits and by this court in *United States v. Veal*, 153 F.3d

1233, 1251-52 (11th Cir. 1998), which addressed the similarly-worded § 1512(b)(3).[4]

In *Veal*, this court rejected a similar argument directed at § 1512(b)(3), which prohibits intimidating or threatening a person with intent to "hinder, delay or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or *possible* commission of a Federal offense." § 1512(b)(3) (emphasis added). This court held that to prove the required federal nexus, the government need prove only that there was "the *possibility* or *likelihood* . . . that information would be transferred to federal authorities." *Veal*, 153 F.3d at 1251-52 (emphasis in original).

In order to establish a violation of § 1512(a)(1)(C), the same issue as the one currently before the court, the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have all held that the government need not prove that a federal investigation is underway or imminent, but rather only that the defendant intended to prevent the murder victim from potentially communicating with federal law enforcement officials generally about a possible federal offense.[5] Subjective proof that the

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[4] In relevant part, 18 U.S.C. § 1512(b)(3) provides that it is a federal offense to

> "[K]nowingly use[ ] intimidation, threaten[ ] or corruptly persuade [ ] another person, or attempt[ ] to do so, or engage[ ] in misleading conduct toward another person, with intent to . . . hinder, delay or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or *possible* commission of a Federal offense. . . " (emphasis added).

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[5] *See United States v. Wright*, 536 F.3d 819, 824 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 1656 (2009); *United States v. Harris*, 498 F.3d 278, 286-87 (4th Cir. 2007) *cert. denied*, 128 S. Ct. 1703 (2008); *United States v. Serrata*, 425 F.3d 886, 897-898 (10th Cir. 2005) (in § 1512 cases "imminence of a federal investigation is of little or no consequence") (collecting cases); *United States v. Bailey*, 405 F.3d 102, 108 (1st Cir. 2005) (rejecting defendant's argument that similarly-worded and interpreted obstruction statute, § 1512(b)(3), "requires an existing or imminent federal investigation at the time of the defendant's misleading conduct"); *United States v. Jefferson*, 149 F.3d 444, 446 (6th Cir. 1998) (sufficient evidence that a murder had been motivated in part by a desire to eliminate a witness even though the murder could not have been intended to prevent the victim from reporting a robbery because the robbery had not yet been committed); *United States v. Romero*, 54 F.3d 56, 62 (2d Cir. 1995) ("The victim need not have agreed to cooperate with any federal authority or even to have evinced an intention or desire to so cooperate. There need not be an ongoing investigation or even any intent to investigate. Rather, the killing of an individual with the intent to frustrate the individual's possible cooperation with federal authorities is implicated by the statute."); *United States v. Edwards*, 36 F.3d 639, 645 (7th Cir. 1994), *abrogated on other grounds*, (holding that the essential mental state for violation of § 1512(a)(1)(C) is that "the defendant *believed* that a person *might* furnish information to federal officials and that he killed or attempted to kill that person in order to prevent such disclosure") (second emphasis added); *United States v. Galvan*, 949 F.2d 777, 783 (5th Cir. 1991). *But see United States v. Bell*, 113 F.3d 1345, 1349, 1357 (3d Cir. 1997) (holding that "the government may carry [its] burden [of proving a federal nexus] by showing that the conduct which the defendant believed would be discussed in these communications constitutes a federal offense, so long as the government also presents "additional appropriate evidence" and that the defendant's

(Continued on following page)

victim actually or likely would have provided information to federal authorities is not required; the defendant's intent is what matters. *Accord United States v. Wright*, 536 F.3d 819, 824 (8th Cir. 2008) ("the government need not prove that the defendant knew a federal investigation was underway, or even contemplated, or that defendant intended to prevent the victim from communicating with federal officials" but "that at least some part of a defendant's motive in killing that victim was to prevent communication with law enforcement officials in the investigation of a possible federal crime") (emphasis, citation, and internal quotation marks omitted); *United States v. Harris*, 498 F.3d 278, 286-87 (4th Cir. 2007) ("So long as the information the defendant seeks to suppress actually relates to the commission or possible commission of a federal offense, the federal nexus requirement is established . . . Thus, under the plain meaning of the applicable statutory language, the government need not prove any state of mind regarding whether the potential investigation that a defendant sought to affect would be conducted by federal officers.") (emphasis omitted); *United States v. Galvan*, 949 F.2d 777, 783 (5th Cir. 1991) ("[T]he statute focuses on the defendant's intent: whether she thought she *might* be preventing [the witness's] future communication of information") (emphasis added).

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knowledge of the federal involvement or the officer's status as a federal officer is "irrelevant").

We now join our sister circuits and apply the rationale in *Veal*, holding that the *possible* or *potential* communication to federal authorities of a possible federal crime is sufficient for purposes of section 1512(a)(1)(C). *See id.* at 1251-52, 1251 n.26.[6]

Here, the federal nexus requirement was clearly satisfied. When Officer Horner discovered the group at the cemetery, they were clad in black and wearing gloves on a spring morning in Florida in a high crime area. Gamble testified that it was obvious that the group was in the process of preparing for illegal activity. Three of them, including Gamble (who Officer Horner knew from his previous robberies) had just committed a robbery affecting interstate commerce; all of them were conspiring to rob a bank; there was evidence in the car to indicate that they were going to (or had already) engaged in armed robbery; and the group had in its collective possession firearms, a stolen car, marijuana, and cocaine. These were all federal crimes and could have led to a federal investigation and prosecution.[7] These facts adequately support Fowler's conviction for violating § 1512(a)(1)(C).

---

[6] Fowler's reliance on *United States v. Ronda*, 455 F.3d 1273 (11th Cir. 2006) is misplaced. That case involved police officers falsifying evidence and making false statements in the investigation of police shootings, and the evidence adduced at trial was that, when a police officer fires his weapon, a "'massive investigation'" ensues, which included consultation with federal officials. *Id.* at 1285-86. This court held that the evidence was sufficient for the federal nexus required for a § 1512(b)(3) conviction. *Id.* at 1287. Though there was evidence presented in *Ronda* that it was likely that the evidence would have been transferred to federal authorities, the *Ronda* court focused on and unequivocally adopted the *Veal* standard that criminal liability under "Section 1512(b)(3) 'does not depend on the existence or imminency of a federal case or investigation but rather on the *possible* existence of a federal crime and a defendant's intention to thwart an inquiry into that crime.'" *Id.* at 1287, 1290 (quoting *Veal*, 153 F.3d at 1250) (emphasis in *Veal*).

AFFIRMED.

---

[7] Bank robbery, robbery affecting interstate commerce, being a felon in possession of a firearm, and possession of a controlled substance violate the following statutory provisions in respective order: 18 U.S.C. §§ 2113, 1951, 922(g); 21 U.S.C. § 844(a).

PETITIONER'S BRIEF

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No. 10-5443

In The
Supreme Court of the United States

◆

CHARLES FOWLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

◆

BRIEF FOR THE PETITIONER

◆

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QUESTION PRESENTED

1. Whether a defendant may be convicted of murder under 18 U.S.C. §1512(a)(1)(C) without proof that information regarding a possible Federal crime would have been transferred from the victim to Federal law enforcement officers or judges.

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The published opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *United States v. Fowler*, 603 F.3d 883 (11th Cir. 2010) and appears at pages 76 to 86 of the Joint Appendix ("J.A."). The District Court's unpublished bench rulings denying the Petitioner's Motion for Judgment of Acquittal appear at J.A. 46 and 50.

◆

JURISDICTION

The District Court had jurisdiction over this Federal criminal case pursuant to 18 U.S.C. §3231. The United States Court of Appeals for the Eleventh Circuit had jurisdiction over the Petitioner's appeal pursuant to 28 U.S.C. §1291. The Eleventh Circuit issued its opinion and judgment on April 14, 2010, and the Petition for Certiorari was filed on July 13, 2010. This Court granted the Petition on November 15, 2010. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

◆

RELEVANT STATUTORY PROVISION

Section 1512 of Title 18, United States Code, is titled, "Tampering with a witness, victim, or an informant." Subsection (a)(1)(C) provides:

> (a)(1) Whoever kills or attempts to kill another person, with intent to –

> (C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;
>
> shall be punished as provided in paragraph (3).

◆

STATEMENT OF THE CASE

The Petitioner, Charles Fowler, has presented the following question for this Court's determination: "Whether a defendant may be convicted of murder under 18 U.S.C. §1512(a)(1)(C) without proof that information regarding a possible Federal crime would have been transferred from the victim to Federal law enforcement officers or judges."

The Government must prove as an essential element of the offense that information regarding a possible Federal crime would have been transferred from the victim to Federal law enforcement officers or judges. The Government presented no such proof in its case against the Petitioner.

Early on the morning of March 3, 1998, Officer Christopher Horner of the Haines City Police Department in Polk County, Florida, died of a single gunshot wound to the head. Officer Horner was shot with his own service weapon. At the time of his death, Officer Horner was patrolling alone at the Oakland Cemetery. See Trial Transcript ("T Tr.") 1 at pp. 39, 41; T Tr. 4 at p. 114.[1]

Just before his death, Officer Horner had notified the Haines City police dispatcher that he was at the Oakland Cemetery – a place where car thieves often abandoned their stolen vehicles – investigating a suspicious vehicle without a visible license tag. There was no further communication from Officer Horner, and his radio silence prompted the shift supervisor, Sgt. Sandra Spicer, to drive to the Oakland Cemetery to investigate. She discovered Officer Horner lying on the ground, with his service weapon under his body. Emergency medical personnel declared Officer Horner dead at the scene. The medical examiner determined that the bullet that caused the officer's death had entered the back left side of his head. T Tr. 1, pp. 41-43, 47, 49-52, 54; T Tr. 2, pp. 26, 31; T Tr. 4, pp. 120, 122.

The Polk County Sheriff's Office ("Sheriff's Office") took control of the investigation. Homicide

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[1] The trial transcripts have the following numbers in this Brief:

T Tr. 1 – June 9, 2008;
T Tr. 2 – June 10, 2008;
T Tr. 3 – June 11, 2008;
T Tr. 4 – June 12, 2008;
T Tr. 5 – June 13, 2008;
T Tr. 6 – June 16, 2008.

Detective Deanna Pry was initially assigned to lead the investigation. She was removed as lead investigator within a week after becoming angry over the fact that the Sheriff's Office refused to consider whether Officer Horner had committed suicide. The issue of suicide had created a feud among personnel in the Sheriff's Office. Officer Horner's death remained unsolved. T Tr. 5, pp. 36, 40, 55, 56, 58, 60.

There was no significant activity in the investigation until the spring of 2002, when Florida state prisoner Christopher Gamble reached out to local law enforcement officials in an effort to reduce a 20-year armed robbery sentence. Gamble claimed to have knowledge about the death of Officer Horner. Detective Louis Giampavolo, a member of the cold case unit of the Sheriff's Office, interviewed Gamble, but no formal state charges were filed. Gamble's descriptions of events were inconsistent, and he admittedly lied to a Federal Grand Jury in early 2003. T Tr. 4, pp. 169-170, 172, 179, 183; T Tr. 3, pp. 155, 158, 169.

According to Gamble, the events of March 3, 1998, began when he and two friends, Jeffrey Bouiye and Andre Paige, stole a Buick Regal and committed an armed robbery of a Holiday Inn in Dundee, Florida. After the robbery, Gamble, Bouiye and Paige returned to Haines City and decided to rob a bank later that morning. They happened to meet up with the Petitioner and Robert Winston in Haines City. T Tr. 3, pp. 95, 99.

The five men drove to the Oakland Cemetery to discuss the bank robbery, smoke cocaine and marijuana, and listen to music. T Tr. 3, pp. 100, 104, 106. Gamble stated that the Petitioner got out of the car and walked alone to a grove of trees. While the Petitioner was away from the vehicle, Officer Horner drove into the cemetery, turned on the spotlight of his patrol car, and exited from his vehicle. Officer Horner had his pistol in one hand and a flashlight in the other. T Tr. 3, pp. 108-110.

Officer Horner ordered the occupants to get out of their car. Bouiye hid in the car while Gamble, Winston and Paige exited. According to Gamble, the Petitioner attacked Officer Horner from behind and attempted to grab his pistol from him. Gamble, Winston, and Paige joined in the struggle to wrest control of the gun from Officer Horner. T Tr. 3, pp. 129, 131-132.

Gamble stated that Officer Horner surrendered his weapon to the Petitioner. The Petitioner ordered Officer Horner to get down on his knees. Gamble claimed that he did not want Officer Horner to be harmed, and he asked the Petitioner for the gun. According to Gamble, Bouiye yelled at the Petitioner to shoot the "cracker." Gamble asserted that the Petitioner fired one shot into Officer Horner's head. T Tr. 3, pp. 132-133, 137.

Gamble stated that he took Officer Horner's gun from the Petitioner and placed it underneath the officer's body. The five men then left the Oakland Cemetery and dropped their bank robbery plans.

Gamble became angry because Officer Horner's death canceled out the bank heist. T Tr. 3, pp. 140, 147.

On September 19, 2007, a Grand Jury in the Middle District of Florida indicted the Petitioner on two counts. The first count accused the Petitioner of murdering Officer Horner in violation of §1512(a)(1)(C) with the intent to prevent the officer from communicating with a law enforcement officer or judge of the United States about the commission or possible commission of a Federal offense. J.A. 1, 15-17.

The Indictment listed six Federal offenses that allegedly motivated the Petitioner to kill Officer Horner – first, that associates of the Petitioner had violated 18 U.S.C. §1951 by committing an armed robbery of a Holiday Inn in Dundee, Florida, earlier in the morning of March 3, 1998; second, that the Petitioner and others were conspiring to rob a bank later in the morning of March 3, 1998, in violation of 18 U.S.C. §§2113 and 371; third, that the Petitioner and others were conspiring to rob the bank in violation of 18 U.S.C. §1951; fourth, that the Petitioner previously had been convicted of a crime punishable by imprisonment for a term exceeding one year and was in knowing possession of a firearm that had been transported in interstate commerce in violation of 18 U.S.C. §922(g); fifth, that the Petitioner and others were in knowing and intentional possession of cocaine in violation of 21 U.S.C. §844(a); and sixth, that the Petitioner and others were in knowing and intentional possession of marijuana in violation of 21 U.S.C. §844(a). J.A. 15-16.

Count 2 of the Indictment charged the Petitioner with a violation of 18 U.S.C. §924(c)(1)(A) for knowingly using and carrying a firearm in relation to a crime of violence for which he may be prosecuted in a court of the United States. The underlying crimes of violence were the alleged conspiracies to commit robbery in violation of 18 U.S.C. §1951 and to commit bank robbery in violation of 18 U.S.C. §§2113 and 371. Count 2 further alleged that while in the course of using and carrying the firearm, the Petitioner committed murder of Officer Horner as defined in 18 U.S.C. §1111. J.A. 17.

The Petitioner went to trial from June 9 to 17, 2008. J.A. 1-3. The Government did not present any evidence to show that Officer Horner would have transferred information to Federal officers if he had not been killed. There was no evidence, for example, that the Haines City Police Department maintained procedures to contact Federal officers in the event of certain activity in the municipality.

The Petitioner presented three defenses at trial – Officer Horner took his own life; alibi witnesses proved that the Petitioner was nowhere near any of the activity described by Gamble; and Gamble was an unreliable witness not worthy of belief.

To show that Officer Horner may well have committed suicide, the defense presented evidence that he was beset with marital and financial problems and had confided to a Police Department colleague that he was seriously considering taking his own life. T Tr. 4, p. 128.

Other witnesses testified that they had seen or spoken with the Petitioner at or near the time of the murder. The Petitioner's mother testified that the Petitioner was at home at the time of Officer Horner's death. T Tr. 6, pp. 60-90, 112-114, 118. Gamble's credibility was significantly placed at issue. T Tr. 3, pp. 198-235; T Tr. 4, pp. 4-83.

The Petitioner moved for a judgment of acquittal at the close of the Government's case in chief and again at the conclusion of all the evidence. The District Court denied the motions. J.A. 47, 50.

The jury found the Petitioner guilty of both counts on June 17, and sentencing took place on September 18, 2008. The District Court imposed a mandatory life sentence on Count 1 and a consecutive 10-year sentence on Count 2. Final judgment was entered on September 19, and the Petitioner appealed to the Eleventh Circuit. J.A. 4.

The Petitioner argued on appeal that the Government had presented insufficient evidence of a violation of §1512(a)(1)(C). The Petitioner asserted that the Government failed to prove that information about a possible Federal crime would have been communicated to Federal law enforcement officers if the murder had not occurred. J.A. 81.

The Eleventh Circuit rejected the Petitioner's argument in its published decision of April 14, 2010. In its description of §1512(a)(1)(C), the Eleventh Circuit quoted a portion of the statute, including the language regarding the intent to "prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . . " J.A. 80. However, in the very next sentence of its Opinion, the Eleventh Circuit identified the facts that the Government must establish "to prove a violation of §1512(a)(1)(C) . . . " Significantly, this description excluded any reference to "a law enforcement officer or judge of the United States." J.A. 80.

Instead, the Eleventh Circuit stated that the only facts that the Government needed to prove were "(1) the defendant knowingly and willfully killed a person; and (2) the defendant killed the person with the intent to prevent the communication of information 'relating to the commission or possible commission of a [f]ederal . . . offense . . . ' 18 U.S.C. §1512(a)(1)(C)." J.A. 80. The Eleventh Circuit's description of the essential elements ignored the clear and specific statutory requirement regarding Federal officers.

According to the Eleventh Circuit, the Petitioner improperly focused on the victim's state of mind instead of the defendant's. The Eleventh Circuit stated:

> Petitioner's sufficiency argument is based on his incorrect assertion that the federal nexus required by §1512(a)(1)(C) requires proof that the victim would have likely communicated information relating to the possible commission of a federal offense to federal

> authorities. In construing the statute this way, Petitioner focuses on the victim's state of mind instead of, as the statute requires, the defendant's state of mind. His approach has been rejected by the majority of our sister circuits and by this court in *United States v. Veal*, 153 F.3d 1233, 1251-52 (11th Cir. 1998), which addressed the similarly-worded §1512(b)(3).

J.A. 81-82.

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SUMMARY OF ARGUMENT

Title 18 U.S.C. §1512(a)(1)(C) makes it a Federal crime to kill or attempt to kill another person "with intent to . . . prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . . " In the case sub judice, the Government's proof was insufficient to convict the Petitioner of a violation of 18 U.S.C. §1512(a)(1)(C) because the Government offered no evidence from which a reasonable jury could conclude, beyond a reasonable doubt, that the Petitioner killed Officer Horner with the intent to prevent a communication to Federal officials about the commission or possible commission of a Federal crime.

The Eleventh Circuit held that the Government satisfied its burden of showing that the Petitioner violated Section 1512(a)(1)(C), even without proof that the victim, Officer Horner, would have communicated information to a Federal officer or judge. The Eleventh Circuit ruled that "possible or potential communication to federal authorities of a possible federal crime is sufficient for purposes of section 1512(a)(1)(C)." The Eleventh Circuit permitted the conviction to stand on the basis of mere possibility or potential. Mere possibility or potential is insufficient under the statute.

The Eleventh Circuit's interpretation of §1512(a)(1)(C) violates basic tenets of statutory interpretation. The analysis of the Eleventh Circuit eliminates the requirement that the victim communicate information to a Federal officer. Section 1512(a)(1)(C) requires more than proof that the defendant acted with intent to prevent communication about a *possible* Federal crime – it requires proof that the communication would have been to a Federal officer or judge. Such Federal officers are specifically defined in §1515(a)(4). By allowing a conviction to stand on nothing but a possible or theoretical communication, the Eleventh Circuit's opinion reads this critical element out of the statute.

In addition to failing to give effect to multiple terms of the statute, the opinion below inserts additional terms as well. While §1512(a)(1)(C) allows a conviction based on proof that the defendant sought to prevent a communication about a "possible" Federal offense, the statute does not contain the word "possible" as a modifier of "communication." A communication to a Federal officer or judge is the critical element that brings the statute within the realm of Congress's regulatory powers; the statute should not be read so broadly as to render its connection to the Federal Government merely a theoretical possibility.

Other Circuits have interpreted the statute to require at least a likely, if not imminent, communication between the victim and the Federal officer. The decisions of the Fifth Circuit in *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999), and the Second Circuit in *United States v. Lopez*, 372 F.3d 86 (2d Cir. 2004), properly apply all elements of §1512(a)(1)(C) and should be adopted by this Court in requiring proof of an actual or likely communication between the victim and Federal authorities regarding the commission or possible commission of a Federal crime.

Causey and *Lopez* require a nexus between the obstructive conduct and the communication of information from the victim to the Federal officer. If there is no communication, there is no nexus. The nexus analyses in *Causey* and *Lopez* are consistent with this Court's nexus decisions in *United States v. Aguilar*, 515 U.S. 593 (1995) and *Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005) (which involved another subsection of §1512). The nexus requirement guards against convictions that rest on speculation or guesswork as to the defendant's intent.

By divesting the offense conduct from the Federal interest underlying the statute, the opinion below raises significant questions about the extent of

Federal power, which are easily avoided by interpreting §1512(a)(1)(C) to require proof of an actual or likely communication between the victim and the Federal official.

Under the Petitioner's construction of the statute, it is clear that the Government failed to present sufficient evidence by which any reasonable jury could have found the Petitioner guilty of violating §1512(a)(1)(C). The robbery of the Holiday Inn in Dundee, Florida, constituted one of the predicate Federal crimes for the Indictment against the Petitioner. Yet, the Government presented no evidence at all to suggest that a Federal agency played any part in the investigation of that offense, or that the Federal Government would have been called to address the other offenses listed in the Indictment.

There was no testimony or exhibit which dealt even remotely with the subject of Officer Horner transferring information to Federal authorities. There was no evidence, for example, of any practices whereby Federal agents met periodically with the Haines City Police Department; Polk County Sheriff's Office; or representatives from the Polk County State Attorney's Office. Without such proof, the Government's evidence was insufficient to establish the nexus between the obstructive conduct and the transfer of information from local law enforcement to a Federal official.

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ARGUMENT

I. The Eleventh Circuit's interpretation of §1512(a)(1)(C) is incompatible with basic principles of statutory construction.

The statute at issue here – 18 U.S.C. §1512(a)(1)(C) – requires that a defendant act with the intent to prevent communication by any person (1) to a "law enforcement officer or judge of the United States", (2) "of information relating to the commission or possible commission of a Federal offense. . . ." A "law enforcement officer" is defined as "an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant." 18 U.S.C. §1515(a)(4).

By its plain terms, §1512(a)(1)(C) requires that the Government prove more than that the defendant intended to impede communications relating to the possible commission of a Federal offense; in addition, the Government must prove beyond a reasonable doubt that the communication would have been to a Federal officer, or as the statute provides, "a law enforcement officer or judge of the United States . . . "

Notwithstanding this plain language, the Eleventh Circuit, perhaps joined by the Fourth and Eighth Circuits,[2] decided that §1512(a)(1)(C) does not require proof of a likely communication of information to Federal authorities. According to the Eleventh Circuit, a possible or potential communication to Federal authorities "is sufficient for purposes of section 1512(a)(1)(C)." J.A. 85.

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[2] See *United States v. Harris*, 498 F.3d 278 (4th Cir. 2007); *United States v. Wright*, 536 F.3d 819 (8th Cir. 2008).

Had Congress intended to permit Federal jurisdiction over any act intended to prevent communication about the "commission or possible commission of a Federal offense," it would not have required that the communication be "to a law enforcement officer or judge of the United States." §1512(a)(1)(C). The statute requires both a Federal crime and communication to Federal authorities.

Instead of giving meaning to every word in §1512(a)(1)(C) and the definitions in §1515(a)(4), the Eleventh Circuit effectively made superfluous the statutory definition of "a law enforcement officer" in §1515(a)(4), making the statute apply whenever a defendant acts with the intent to prevent communication with *any* law enforcement officer, Federal or otherwise, about a potential Federal offense. See, e.g., *Marbury v. Madison*, 5 U.S. 137, 174 (1803) ("The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction . . . it cannot be presumed that any clause . . . is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."); *Beck v. Prupus*, 529 U.S. 494, 506 (2000) (long-standing canon of statutory construction is that statutory terms are not to be construed so as to render any provision of statute meaningless or superfluous); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.").

The opinion below further errs by judicially inserting the word "possible" before the word "communication" in the statute. Congress employed the word "possible" in §1512(a)(1)(C) when it referred to "the commission or possible commission of a Federal offense . . . " In the context of "possible commission," the word "possible" means a future event or an event that already has occurred and could constitute a Federal offense upon full investigation. However, Congress did not use the word "possible" at the beginning of subsection (C) before the word "communication." Therefore, while the commission of a Federal offense might be "possible," there must be actual communication to a Federal official.

Although Congress provided for certain contingencies where commission of a Federal offense was concerned, it did not see fit to include the word "possible" as a modifier of communication. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002). Congress therefore intended that the communication to be protected would be certain or likely, not merely possible.

In deciding that a possible or potential communication was sufficient under §1512(a)(1)(C), the Eleventh Circuit ignored the language of the statute and opened the door for convictions which Congress never intended. "It is the '"cardinal principle of statutory construction" . . . [that] [i]t is our duty "to give effect, if possible, to every clause and word of a statute" . . . rather than to emasculate an entire section.' *United States v. Menasche*, 348 U.S. 528, 538 (1955) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937), and *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883))." *Bennett v. Spear*, 520 U.S. 154, 173 (1997). To prevent the emasculation of §1512(a)(1)(C), this Court should adopt the Second Circuit's decision in *United States v. Lopez*, 372 F.3d 86 (2d Cir. 2004) (as discussed in Part II of this Argument), as a correct interpretation of the statute and hold that the Government must adduce evidence that the victim plausibly would have turned to Federal officials. The Government's evidence must demonstrate "a realistic likelihood" of such communication, and not merely a "theoretical possibility."

II. The decisions of the Fifth Circuit in *Causey* and the Second Circuit in *Lopez* correctly apply the requirements of §1512(a)(1)(C).

Two Courts of Appeals – the Fifth Circuit in *United States v. Causey*, 185 F.3d 407 (5th Cir. 1999), and the Second Circuit in *United States v. Lopez*, 372 F.3d 86 (2d Cir. 2004) – have reversed convictions under §1512(a)(1)(C) because the Government presented insufficient evidence to establish that the victims in those cases would have transferred information to Federal officials. *Causey* and *Lopez* properly apply the essential elements of the statute and should be adopted by this Court as accurate expressions of the standards governing cases under §1512(a)(1)(C).

In *Causey*, New Orleans Police Officer Len Davis targeted Kim Marie Groves for assassination because she had filed a complaint with the Police Department's internal affairs division and accused him of brutality. Davis enlisted Paul Hardy and Damon Causey in his murder plot. The three men planned the murder and subsequent cover up. Hardy was the trigger man who actually shot Ms. Groves. Id., 185 F.3d at 411.

The three men were indicted in United States District Court on multiple charges – denying Ms. Groves her civil rights in violation of 18 U.S.C. §§241 and 242, and killing Ms. Groves with the intent to prevent her from communicating information to a Federal law enforcement officer relating to the commission of a Federal offense in violation of §1512(a)(1)(C). The jury found Davis and Hardy guilty on all counts and Causey on just the civil rights offenses. Id., 185 F.3d at 411.

The defendants appealed, and the Fifth Circuit reversed the convictions against Davis and Hardy under §1512(a)(1)(C). The Fifth Circuit held that "the evidence was not sufficient to establish the federal nexus required by §1512." Id., at 422.

The basis for the Fifth Circuit's decision was the absence of any communication between Ms. Groves and Federal law enforcement officers. Although "the evidence was sufficient to establish that Groves's police brutality complaint concerned a federal crime and that the defendants intended to interfere with Groves's pursuit of that complaint," the crucial consideration in the Fifth Circuit's view was the fact that "the only agency to which Groves had complained was the New Orleans Police Department." Id., at 423.

The Fifth Circuit found nothing in the record to support jury findings that "any of the persons to whom Groves complained were federal officers" or "that Groves had any intention of communicating with any federal law enforcement officer prior to her death." Further, there was no evidence to support an inference that "Davis intended to prevent Groves from pursuing her complaint beyond the New Orleans Police Department IAD and communicating with authorities who were in fact federal officers." Id., at 423.

In the case at bar, just like in *Causey*, there is nothing in the record to support jury findings that any of the persons to whom Officer Horner normally reported were Federal officers, or that Officer Horner intended to communicate with any Federal law enforcement officers prior to his death. Further, there was no evidence to support an inference that the

Petitioner intended to prevent Officer Horner from reporting any crime to any law enforcement agency outside Polk County, Florida.

The Fifth Circuit in *Causey* focused its attention on the fact that the victim, Ms. Groves, had not sought out Federal authorities or shown any intention of doing so. Because communication had not occurred and had not appeared likely to occur, the Government failed to establish the nexus between the obstructive conduct and the particular type of proceeding which §1512(a)(1)(C) was intended to protect.

The Eleventh Circuit decision in the present case is plainly at odds with *Causey*. The Eleventh Circuit criticized the Petitioner for "his incorrect assertion that the federal nexus required by §1512(a)(1)(C) requires proof that the victim would have likely communicated information relating to the possible commission of a federal offense to federal authorities." According to the Eleventh Circuit, the Petitioner's construction of the statute mistakenly "focuses on the victim's state of mind instead of, as the statute requires, the defendant's state of mind. This approach has been rejected by the majority of our sister circuits and by this court in *United States v. Veal*, 153 F.3d 1233, 1251-52 (11th Cir. 1998), which addressed the similarly-worded §1512(b)(3)."

Causey, however, did focus on the state of mind of Ms. Groves and the fact that she had not communicated with Federal authorities. The absence of any actual or likely communication in *Causey* meant that the Government failed to establish the nexus under §1512(a)(1)(C). Therefore, the Eleventh Circuit's ruling, according to the logic of *Causey*, is incorrect and must be reversed.

Like *Causey*, the Second Circuit's *Lopez* case involved a victim who went to local police for help but never turned to Federal law enforcement. Like the Fifth Circuit in *Causey*, the Second Circuit held in *Lopez* that the Government failed to prove the "requisite federal nexus." See *Lopez*, 372 F.3d at 91.

The Second Circuit declared that "there must be evidence – not merely argument" of an individual's possible cooperation with Federal authorities. "In other words, the government must adduce evidence from which a rational juror could infer that the victim plausibly might have turned to federal officials." Id., at 92.

Carlos Lopez, a Brooklyn drug dealer, threatened an individual named Edward Montalvo at gunpoint. Montalvo reported the incident to the New York City police and expressed fear that Lopez would kill him. Montalvo pleaded with local authorities to prosecute Lopez for criminal possession of guns, but they decided instead to charge Lopez with less serious offenses. Fearing for his life, Montalvo went to a state court and obtained a temporary order of protection against Lopez. Id., at 89.

Montalvo never approached Federal authorities for assistance. On the eleventh day after the state court had issued its temporary order of protection, Lopez went to Montalvo's apartment and shot and killed Montalvo. Id., at 89.

Carlos Lopez was indicted for obstruction of justice murder under §1512(a)(1)(C) as a result of the killing of Montalvo. The jury found Carlos Lopez guilty, but the Second Circuit reversed the murder conviction.

The Second Circuit based its reversal of the §1512(a)(1)(C) conviction on the fact that Montalvo never sought out Federal authorities. Further, there was no evidence of any Federal investigation into Lopez's activities at the time of Montalvo's death. According to the Second Circuit, "All the government proved was that conduct punishable under both state and federal law was involved and that Montalvo was willing to communicate with local authorities. The Government did show that Montalvo feared for his life after the district attorney declined to pursue more serious charges. But even after that decision, Montalvo did not turn to Federal officials; instead, he returned to local authorities for a protective order. There simply is no evidence that, despite the passage of over ten days between the issuance of the protective order and his murder, Montalvo ever turned to, or gave so much as a moment's thought of turning to, Federal officers, or that Federal agents were otherwise involved. The Government provided no evidence, for example, that a Federal investigation was underway, that Federal authorities were in any way involved, that Lopez knew of the Federal nature of his offense at the time he murdered Montalvo, or that

Montalvo intended to communicate or anticipated communicating with Federal authorities. See, e.g., *Causey*, 185 F.3d at 422-23." Id., at 92. (*emphasis supplied*).

In the case at bar, the Government provided no evidence that a Federal investigation was underway, or that Federal authorities were involved, even after four years following the death of Officer Horner. Likewise, there was no evidence that Officer Horner, like Montalvo in *Lopez*, intended to communicate or anticipated communicating with Federal authorities.

The Second Circuit in *Lopez* refused to affirm the conviction on the basis of possibilities or things that might happen:

> It is always possible that Montalvo someday 'might' have turned to federal officials; but the range of things he 'might' do is limitless, and no evidence in the record connects this possibility with reality. On these facts, even drawing all reasonable inferences in the government's favor, we hold that a reasonable jury could not conclude that Lopez killed Montalvo to prevent his communication to a federal law enforcement officer. Accordingly, we reverse Lopez's conviction on Count III.

Lopez, at 92.

Applying the Second Circuit's logic to the present case should result in a reversal of the Petitioner's conviction. A communication between Officer Horner and Federal officials is devoid of "reality." A reasonable jury could not possibly have concluded, therefore, that the Petitioner killed Officer Horner to prevent his communication to a Federal law enforcement officer.

Judge Jon Newman dissented from the decision to reverse Lopez's conviction. The dissenting judge believed that the facts of the case – Montalvo's fear of Lopez and his dissatisfaction with the steps taken by local authorities – made it "entirely reasonable to conclude that he [Montalvo] would then have turned to federal authorities and reported the defendant's federal conduct." Id., at 96. In fact, the dissenting judge believed that Montalvo's eventual resort to Federal authorities was "a highly likely prospect, had he not been murdered eleven days later." Id., at 95. (*emphasis supplied*).

While disagreeing with the majority as to the inferences to be drawn from the trial evidence, the dissent nevertheless agreed that §1512(a)(1)(C) requires something more than the "theoretical possibility" of a communication between the victim and a Federal official. Instead, there must be "a realistic likelihood" of such communication to support a conviction. Id., at 95. The dissent's reasoning in *Lopez* is favorable to the Petitioner in the present case:

> Of course, the statute requires something more than the theoretical possibility that the victim would have communicated with a federal official. When a person knows of conduct that constitutes a federal crime, the possibility, in that sense, always exists that he will tell some federal official. If that sort of possibility sufficed, the statute would be violated

> by anyone murdering a person who knew about a federal crime. The statute must be understood to mean that the possibility of a communication with a federal official has some plausibility. The evidence must provide the jury with some reason to believe that there was a realistic likelihood that the victim would have communicated with a federal official.

Id., at 95.

The jury in the Petitioner's case was not provided with any evidence to meet the standards described in the dissent's rationale. There was no testimony or exhibit which dealt even remotely with the subject of Officer Horner transferring information to Federal authorities – no evidence, for example, of any policies or programs in effect where Federal agents met periodically with Haines City police officers or representatives from the Polk County State Attorney's Office.

The robbery of the Holiday Inn in Dundee, Florida, constituted one of the predicate Federal crimes for the Indictment against the Petitioner. Yet, the Government presented no evidence at all to suggest that a Federal agency played any part in the investigation of that offense.

The Government's first two trial witnesses were the night manager of the Holiday Inn and the local Dundee police officer who responded to the emergency call and arrived at the motel moments after the robbers had sped away from the scene. T Tr. 1, pp. 11-33. As "a theoretical possibility," a Holiday Inn official or a member of the Dundee Police Department perhaps could have contacted the FBI to report a Federal crime immediately after it occurred.

Yet, the Government presented no such evidence linking the Holiday Inn robbery to Federal involvement. There was no proof of any kind that demonstrated a "reasonable likelihood" of communication between the Dundee Police Department or Holiday Inn officials and a Federal law enforcement officer. Likewise, there was no "reasonable likelihood" of communication between Officer Horner and a Federal official. Without such proof, the Government's evidence was insufficient to establish the nexus between the obstructive conduct and the transfer of information from Officer Horner to a Federal official.

Causey and *Lopez* are the only two decisions in which a Court of Appeals has reversed a conviction under §1512(a)(1)(C) because of insufficient evidence regarding communication between the victim and the Federal authorities. However, other appellate courts have determined that the Government presented sufficient evidence of communication to sustain convictions under §1512(a)(1)(C). These decisions provide guidance for how the Government should proceed in securing a conviction under §1512(a)(1)(C).

For example, the First Circuit stated in *United States v. Rodriguez*, 390 F.3d 1 (1st Cir. 2004), that the communication element "may be proven, among other ways, by demonstrating that the underlying offense was a federal offense and that the federal authorities had begun an investigation prior to the informant's murder or attempted murder." Id., at 13. The "government easily met its burden" in *Rodriguez*. "The federal government, through the [Drug Enforcement Administration] had opened an investigation into this [drug] conspiracy and interviewed [the victim] prior to the murder." The First Circuit dismissed as "irrelevant" the defendant's claim that he had not realized that he was helping to conceal a Federal crime by murdering the victim. Id., at 13.

In *United States v. Bell*, 113 F.3d 1345 (3rd Cir. 1997), the victim "had been acting as an informant for the Tri-County Drug Task Force," an organization that consisted of "local, state and federal investigators" and "developed federal as well as state cases." Id., at 1346-1347. The Third Circuit held that "it was reasonable for the jury to infer that if [the victim] had continued to cooperate with a partially federal law enforcement body regarding conduct constituting federal crimes, at least one of her communications would have been to a federal officer or to an officer authorized to act on behalf of the federal government." Id., at 1350.

The Defendant in *Bell* claimed that the evidence "reveals no nexus between her charged conduct and any federal interest." The Third Circuit disagreed and stated that "because the evidence is sufficient to sustain [the defendant's] convictions for tampering with a federal informant, we reject her jurisdictional argument." Id., at 1350.

The Eighth Circuit focused on the victim's participation in a Federal investigation in *United States v. Emery*, 186 F.3d 921 (8th Cir. 1999). The Eighth Circuit declared that it "is sufficient for conviction that the victim was actually cooperating in a federal investigation or in the investigation of a federal crime, and that at least some part of a defendant's motive in killing that victim was to halt that cooperation . . . " Id., at 925. The evidence at trial enabled a reasonable jury to "conclude that [the victim] was cooperating with an agent of the federal Bureau of Alcohol, Tobacco, and Firearms (BATF), and that some part of Mr. Emery's motivation for killing her was to stop this cooperation. [The victim] gave the BATF agent substantial information about Mr. Emery's activities that constituted federal crimes, agreed to testify if necessary, and attempted to record conversations with Mr. Emery about drug trafficking on a micro-cassette recorder provided by the BATF agent." Id., at 925.

In the case at bar, there is no evidence that the Federal authorities had begun an investigation into the Holiday Inn robbery or any other Federal crime prior to Officer Horner's death, as was the case in *Rodriguez*. Likewise, there is no information that Officer Horner was working with a joint state-federal task force, as was the case in *Bell*. Finally, there is no evidence that Officer Horner was cooperating with any Federal agent prior to his death, as was the case in *Emery*. If the Government had provided proof of Federal involvement, as illustrated in *Rodriguez*, *Bell*, or *Emery*, the conviction would stand. Since no evidence was provided in the present case, the Petitioner's conviction should be reversed.

III. The Court has construed related statutes to require a nexus to an actual Federal proceeding.

Requiring proof of an actual or at least likely communication with Federal authorities is consistent with precedent from this Court applying a nexus requirement in cases where the defendant is accused of obstruction of justice, witness intimidation, perjury and other conduct that subverts the Federal judicial process. See *United States v. Aguilar*, 515 U.S. 593 (1995); *Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005). The nexus requirement places a burden on the Government to establish a connection between the wrongful conduct attributed to the defendant and a specific Federal interest that the particular criminal statute is designed to protect.

Arthur Andersen is the only decision in which this Court has construed any portion of §1512. Subsections 1512(b)(2)(A) and (B) were at issue in *Arthur Andersen*. Those particular subsections make it a crime to "knowingly . . . corruptly persuade" another person "with intent to . . . cause" that person to "withhold" documents from, or "alter" documents for use in an "official proceeding." Id., at 703.

Arthur Andersen was the auditing firm for Enron Corporation. The Grand Jury indicted the firm for allegedly violating §§1512(b)(2)(A) and (B) by destroying documents at a time when Enron's financial condition was crumbling and the Securities and Exchange Commission was conducting an investigation. The Indictment alleged that Arthur Andersen corruptly persuaded its employees to withhold from, and alter documents for use in, "official proceedings, namely: regulatory and criminal proceedings and investigations." Id., at 702.

The jury found Arthur Andersen guilty, and the Court of Appeals for the Fifth Circuit affirmed. This Court reversed, holding that "the jury instructions were flawed in important respects." Id., at 698, 708. Among other defects, the instructions "led the jury to believe that it did not have to find any nexus between the 'persua[sion]' to destroy documents and any particular proceeding." Id., at 707.

The Government "resist[ed] any type of nexus element," and relied upon §1512(e)(1), stating that an official proceeding "need not be pending or about to be instituted at the time of the offense," as the basis for its opposition. Id., at 707.[3]

This Court rejected the Government's argument and held that the prosecution still was required to prove that a proceeding was at least foreseen if not yet instituted. "It is, however, one thing to say that a proceeding 'need not be pending or about to be instituted at the time of the offense,' and quite another to say a proceeding need not even be foreseen. A 'knowingly . . . corrup[t] persuade[r]' cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material." Id., at 708.

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[3] Subsection (e)(1) was redesignated as subsection (f)(1) by Pub L. 107-204, Section 1102, July 30, 2002.

This Court compared the nexus requirement in *Arthur Andersen* to "a similar situation in *Aguilar* . . ." The defendant in *Aguilar* was a Federal district court judge who made false statements to an agent for the Federal Bureau of Investigation and then was convicted of "'corruptly endeavor[ing] to influence, obstruct, and impede [a] . . . grand jury investigation'" in violation of 18 U.S.C. §1503. *Arthur Andersen*, 544 at 708, quoting *Aguilar*, 515 U.S. at 599.

The Ninth Circuit reversed the §1503 conviction in *Aguilar*, and this Court affirmed the Ninth Circuit's decision. As described in *Arthur Andersen*,

> All the Government had shown [in *Aguilar*] was that Aguilar had uttered false statements to an investigating agent "who might or might not testify before a grand jury." Id., at 600. We held that §1503 required something more – specifically, a "nexus" between the obstructive act and the proceeding. Id., at 599-600. "[I]f the defendant lacks knowledge that his actions are likely to affect the judicial

proceeding," we explained, "he lacks the requisite intent to obstruct." Id., at 599.

Arthur Andersen, 544 U.S. at 708.

Arthur Andersen and *Aguilar* thus establish that a Federal statute requires the specific intent to obstruct or interfere with a judicial proceeding; a defendant's generally obstructive conduct is not by itself sufficient. It was not enough under *Arthur Andersen* and *Aguilar* that a defendant committed a wrongful act while a Federal proceeding was on the horizon – an SEC investigation in *Arthur Andersen* and a grand jury investigation in *Aguilar*. There had to be proof that the defendant's conduct had a tangible connection to the proceeding which the statute of conviction is intended to protect.

The Eleventh Circuit ignored the nexus requirement of *Arthur Andersen* and *Aguilar* when it held in the present case that the Government did not need to prove that information would have been transferred from Officer Horner to Federal officers. The mere possibility that a Federal crime had been committed was all that the Eleventh Circuit demanded to establish the Petitioner's guilt. A nexus between the obstructive conduct and the proceeding – a communication with Federal officers – was left to chance. Any degree of certainty or likelihood was unnecessary in the Eleventh Circuit's free-ranging view of the statute.

The Petitioner acknowledges that the nexus requirement can be satisfied in prosecutions under §1512(a)(1)(C) even if the victim does not communicate directly with Federal law enforcement officers.

In the present case, for example, the Government could have carried its burden if there had been proof that agents of the Federal Bureau of Investigation or Drug Enforcement Administration routinely conferred with members of the Haines City Police Department to discuss criminal activity. As another example, if the State Attorney's Office in Polk County, Florida, regularly furnished local arrest or incident reports to Federal agencies, it would have been reasonably likely that information obtained by Officer Horner would have worked its way to Federal officers.

The Government, however, did not present any evidence that tended to prove the likelihood of a transfer of information. The jury had no evidence, let alone sufficient evidence, to prove that information regarding a possible Federal crime would have been transferred from Officer Horner to Federal agents, whether directly or through intermediaries. Without proof of the nexus between the wrongful conduct and the proceeding, the Government failed to prove every element of §1512(a)(1)(C) beyond a reasonable doubt.

In contrast to the present case, the evidence in *United States v. Perry*, 335 F.3d 316 (4th Cir. 2003), demonstrated a working relationship between local police and Federal authorities with respect to the transfer of information regarding possible Federal crimes. In *Perry*, the Fourth Circuit affirmed the defendant's conviction under §1512(b)(3), which prohibits misleading conduct toward another person with intent to hinder, delay or prevent communication to

Federal authorities regarding the commission or possible commission of a Federal offense.

The defendant in *Perry* was arrested by the Montgomery County (Maryland) Police Department (MCPD) on state weapons charges following a traffic stop and consensual search of his car. The defendant provided the MCPD with a false name and date of birth in an effort to conceal his status as a convicted felon. When the MCPD learned the defendant's true identity and criminal history, it referred the information to Federal authorities pursuant to standard practice. Id., at 319.

The defendant's concealment of his true identity led to an indictment and conviction under §1512(b)(3). In affirming the conviction, the Fourth Circuit emphasized that the MCPD regularly communicated information to Federal authorities when felons had been arrested for weapons offenses.

At one point, the Fourth Circuit observed that it was standard practice for local law enforcement agents to notify their Federal counterparts when felons were arrested for firearm offenses: "Under the evidence, the standard practice of the MCPD is to check the criminal history of all persons arrested for firearms offenses, utilizing name and date of birth, in order to identify any that are felons. Once such an individual is identified, an Assistant State's Attorney decides whether that person's case should be referred to the United States Attorney and the ATF." Id., at 319, fn. 1.

The defendant's concealment of his true identity was seen as an effort to hinder the regular communications between local and Federal agencies: "As the evidence demonstrated, the MCPD regularly communicated with federal authorities regarding felons who were arrested for firearms offenses. Accordingly, the jury was entitled to conclude that, had Perry's true name and date of birth gone undetected, he would have successfully hindered the MCPD's communication with federal officials regarding possible federal crimes – conduct the statute is designed to prevent." Id., at 321, fn. 8.

Ergo, the nexus requirements established by this Court in *Arthur Andersen* and *Aguilar* contradict the Eleventh Circuit opinion in the present case. As is well illustrated in the Fourth Circuit's *Perry* opinion, far more than a mere possibility of communications to a Federal officer is required.

IV. The Federal Government wrongfully exercises a general police power if it prosecutes persons under §1512(a)(1)(C) without proof that a valid Federal interest protected by the statute has been affected.

Congress may not wield "a general 'police power, which the Founders denied the National Government and reposed in the States.' [citing *United States v. Morrison*, 529 U.S. 598, 618 (2000)]." *United States v. Comstock*, ___ U.S. ___, ___, 130 S.Ct. 1949, 1964 (2010). "Under our federal system, the States possess primary authority for defining and enforcing the criminal law." (*citations and internal quotations omitted*). *United States v. Lopez*, 514 U.S. 549, 561, fn. 3 (1995). "It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government . . . " *Patterson v. New York*, 432 U.S. 197, 201 (1977).

This Court has stated time and again that Federal criminal statutes are not to be construed in a way that will upset the delicate balance between State and Federal powers. In *United States v. Bass*, 404 U.S. 336 (1971), this Court held that 18 U.S.C. §1202(a)(1), a statute that prohibited convicted felons from possessing firearms, required the Government to prove that the weapons were in or affecting interstate commerce.

The Government had advocated a broad reading that would have dispensed with a showing of interstate commerce. This Court rejected the Government's proposal and stated, "Because its [the statute's] sanctions are criminal, and because, under the Government's broader reading, the statute would mark a major inroad into a domain traditionally left to the States, we refuse to adopt the broad reading in the absence of a clearer direction from Congress." Id., at 339.

This Court declared in *Bass* that Congressional restraint in the enactment of criminal laws is essential to American federalism, comparable to the abstention doctrine as expressed in *Younger v. Harris*, 401 U.S. 37 (1971):

> Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. This congressional policy is rooted in the same concepts of American federalism that have provided the basis for judge-made doctrines. See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971). As this Court emphasized only last Term in *Rewis v. United States*, supra, [401 U.S. 808 (1971)], we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.

Id., at 349.

In the present case, the Eleventh Circuit's opinion upsets the federal-state balance by affirming a conviction under §1512(a)(1)(C) even though communications to Federal officers never occurred. The Government produced no evidence that Office Horner would be likely to communicate with a Federal officer, and in the absence of such proof, the Federal Government has altered the relation between Federal and state criminal jurisdiction.

In *Jones v. United States*, 529 U.S. 848 (2000), this Court rejected the Government's contention that the Federal arson statute at 18 U.S.C. §844(i) applied to owner-occupied residences that were not used for any commercial purpose. The interpretation advocated by the Government would have subjected virtually every building in the country to Federal jurisdiction. "Were we to adopt the Government's expansive interpretation of §844(i), hardly a building in the land would fall outside the federal statute's domain." Id., at 857.

This Court rejected an interpretation that would have allowed the Federal Government to intrude into a subject long identified as a "paradigmatic common-law state crime. . . ." Id., at 858. Relying in part upon *United States v. Lopez*, 514 U.S. 549 (1995), this Court stated in *Jones*:

> Given the concerns brought to the fore in *Lopez*, it is appropriate to avoid the constitutional questions that would arise were we to read §844(i) to render the "traditionally local criminal conduct" in which petitioner Jones engaged "a matter for federal enforcement." *United States v. Bass*, 404 U.S. 336, 350 (1971) . . . We have cautioned, as well, that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance" in the prosecution of crimes. *Bass*, 404 U.S. at 349. To read §844(i) as encompassing the arson of an owner-occupied private home would effect such a change, for arson is a paradigmatic common-law state crime. . . .

Jones, at 858.

Murder, at issue in the case at bar, is a paradigmatic common law state crime. It may have Federal implications if it involves a Federal law officer or is communicated to a Federal officer to prevent a Federal crime. On the other hand, the concept of Federalism is compromised by a conviction under §1512(a)(1)(C) when, as in the present case, the victim would not have communicated with a Federal officer.

The restrained approach endorsed in *Jones* played a key role in *Cleveland v. United States*, 531 U.S. 12 (2000). This Court concluded in *Cleveland* that video poker licenses issued by the State of Louisiana did not constitute "property" for purposes of the mail fraud statute at 18 U.S.C. §1341. Without a "clear statement by Congress," this Court refused to "read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States." Id., at 27.

This Court "resist[ed] the Government's reading of §1341 as well because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." This Court relied upon *Jones* for the proposition that Congress does not intend to upset the federal-state balance in the prosecution of crimes:

> Equating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities . . . As we reiterated last

> Term, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." *Jones v. United States*, 529 U.S. 848, 858 (2000) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971).

Cleveland, at 24.

This Court recognized as long ago as 1821 that Congress "has no general right to punish murder committed within any of the States," and " . . . cannot punish felonies generally." *Cohens v. Virginia*, 6 Wheat. 264, 426, 428 (1821) (Marshall, C.J.), cited in *United States v. Morrison*, 529 U.S. 598, 618 (2000), where this Court stated, "[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."

The Petitioner does not contend that Congress exceeded its powers with the enactment of §1512(a)(1)(C). This Court has described "perjury and witness tampering as federal crimes enacted in furtherance of the power to constitute federal tribunals." See *United States v. Comstock*, __ U.S. ___, ___, 130 S.Ct. 1949, 1958 (2010), citing to *Jinks v. Rockland County*, 538 U.S. 456, 462, fn. 2 (2003), which in turn cited *McCulloch v. Maryland*, 4 Wheat. 316, at 417 (1819).

However, if the Government does not have to prove that the victim's communication with Federal authorities was likely to occur, the statute will be used in a broad range of circumstances unrelated to the basic purpose of protecting and encouraging the transfer of information to Federal authorities. To prevent the Government from converting §1512(a)(1)(C) into a criminal statute of general application, this Court should adopt the Second Circuit's decision in *Lopez* and the Fifth Circuit's decision in *Causey* as a correct interpretation of the statute and hold that the Government must adduce evidence that the victim plausibly would have turned to Federal officials. The Government's evidence must demonstrate "a realistic likelihood" of such communication, and not merely a "theoretical possibility."

Applying a standard of "plausibility" or "realistic likelihood" will result in a judgment of acquittal in the Petitioner's favor. The Government presented no evidence at all on the issue of communication between Officer Horner and Federal authorities.

◆

CONCLUSION

For the reasons stated herein, Charles Fowler respectfully requests that his conviction under 18 U.S.C. §1512(a)(1)(C) be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

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FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 18 U.S.C. 1512(a)(1)(C), which makes it a crime to kill someone with the intent to prevent the communication of information relating to the commission or possible commission of a federal offense to a federal law enforcement officer or federal judge, requires proof that the victim would in fact have communicated such information to federal officers.

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OPINION BELOW

The opinion of the court of appeals (J.A. 76-86) is reported at 603 F.3d 883.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 2010. The petition for a writ of certiorari was filed on July 13, 2010, and granted on November 15, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-9a.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of killing another person with the intent to prevent communication by any person to a law enforcement officer relating to the commission or possible commission of a federal offense, in violation of 18 U.S.C. 1512(a)(1)(C) and (3)(A), 1111(a), and 2 (Count 1); and premeditated murder with a firearm, in violation of 18 U.S.C. 924(c)(1)(A) and (j)(1), 1111(a), and 2 (Count 2). J.A. 15-20, 80. He was sentenced to life imprisonment on Count 1 and a consecutive sentence of ten years of imprisonment on Count 2. The court of appeals affirmed. J.A. 76-86.

1. Congress enacted 18 U.S.C. 1512 as part of the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4(a), 96 Stat. 1249-1253, in order to "enhance and protect the necessary role of crime victims and witnesses in the criminal justice process." § 2(b)(1), 96 Stat. 1249. The statute now authorizes punishment for:

> Whoever kills or attempts to kill another person, with intent to—
>
> * * * * *
>
> prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings.

18 U.S.C. 1512(a)(1)(C). Section 1515(a)(4) clarifies that the term "law enforcement officer" means federal law enforcement officer by defining the term to mean "an

officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant." 18 U.S.C. 1515(a)(4). But Section 1512 also provides that: "In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance * * * that the law enforcement officer is an officer or employee of the Federal Government." 18 U.S.C. 1512(g)(2).

2. In the early morning hours of March 3, 1998, petitioner and Robert Winston were recruited by Christopher Gamble, Andre Paige, and Jeffrey Bouyie, to assist in robbing a NationsBank branch later that day. J.A. 22, 77. At the time the five men joined forces, petitioner and Winston had recently committed a robbery and had stolen a car, and the other three men had recently robbed a Holiday Inn. J.A. 22-23, 77. Together, the group of men used the stolen car to surveil the bank; retrieved guns, masks, and gloves to use in robbing the bank; and drove to Oakland Cemetery to prepare for the robbery. J.A. 77.

At the cemetery, the five men prepared to rob the bank by discussing their plans, listening to music, drinking alcohol, and using illegal drugs. J.A. 22-26, 77. Shortly before dawn, petitioner walked away from the other four men so that he could use cocaine without having to share the cocaine with his companions. J.A. 23-26, 77. While petitioner was away from the other men, Haines City Police Officer Christopher Todd Horner drove up behind the stolen car and shined a spotlight on the car and its occupants. J.A. 26-27, 77-78. Officer Horner was patrolling the cemetery because it was known to be a high-crime area, particularly for using drugs and disposing of stolen cars. J.A. 77-78. Before approaching the group of men, Officer Horner informed the Haines City police dispatcher that he was going to investigate a suspicious vehicle. J.A. 78.

When Officer Horner approached the men in the stolen car, he pulled out his gun, shined his flashlight on the men, and asked them what they were doing. J.A. 27-29. Gamble testified at petitioner's trial that he and the other three men in the car were nervous when Officer Horner arrived because they "had guns, drugs." J.A. 27. He testified that he told the three other men in the car with him to "stay cool," but that he knew they were "basically caught in the act." J.A. 27-28. Gamble noted that it was "evident" to Officer Horner that the men were preparing to commit a robbery because they were wearing black clothing and gloves, and because Officer Horner knew that Gamble had previously been involved in robberies. J.A. 30-31, 34, 78. Gamble and Winston got out of the stolen car and Gamble attempted to make excuses for their presence in the cemetery. J.A. 35. Officer Horner told the group to give him their names so that he could check to see whether there were any outstanding warrants for the men. J.A. 28, 35-37, 78. As he did so, Officer Horner backed up to his own car, keeping his gun pointed at the men in and around the stolen car. J.A. 36-37. Gamble testified that Officer Horner seemed nervous, was reaching for something, and was presumably returning to his car to "call for backup." J.A. 36-37, 43-44.

As Officer Horner was returning to his car, petitioner came up behind him and reached for the officer's gun. J.A. 37, 78. Petitioner, with assistance from Gamble, Winston, and Paige, subdued Officer Horner and got control of his gun. J.A. 37-39, 78. When petitioner ordered Officer Horner to get on his knees, Horner complied. J.A. 39, 79. Petitioner pointed the gun at the back of Officer Horner's head and told him not to move. J.A. 40. Gamble tried to reassure Officer Horner that nothing would happen to him; in response, Officer Horner said to Gamble, "Chris, why are you doing this?" J.A. 38-40, 78. At that point, Gamble testified, "everything got out of control" because the other men knew that Officer Horner had identified Gamble. J.A. 38. Gamble testified that petitioner said: "Oh, man, you know him? You know him? Oh, man, why? Now we can't walk away from this thing." J.A. 38, 40, 78. Gamble asked petitioner to give him Officer Horner's gun; instead, Bouyie screamed to petitioner that he should "kill that cracker," and petitioner killed Officer Horner by shooting him in the back of the head. J.A. 42-43, 79.

Officer Horner's death remained unsolved until March 2002 when Gamble, who was in state custody for a robbery that he committed after the murder, began cooperating with state officials. J.A. 79. Gamble confessed to a string of unsolved robberies, including the robbery of the Holiday Inn on March 3, 1998, and eventually disclosed the details of Officer Horner's murder to Detective Louis Giampavolo of the Polk County Sheriff's office. 6/12/2008 Tr. 167, 172-183. Detective Giampavolo presented the information from Gamble's debriefings to federal authorities after Giampavolo learned that the Holiday Inn robbery was outside the four-year state statute of limitations period. *Id.* at 185-187.

After testifying before a federal grand jury in the Middle District of Florida in January and February 2003, Gamble was indicted on 14 federal counts, including for robbery, conspiracy to commit robbery, various firearms offenses, and the murder of Officer Horner. 6/12/2008 Tr. 186. Gamble pleaded guilty to all 14 counts of the indictment and received a sentence of life imprisonment. 6/11/2008 Tr. 168-170, 176, 181-182, 185-189; 6/12/2008 Tr. 172-176, 180-181, 184-188; J.A. 79.

3. On September 19, 2007, a federal grand jury in the Middle District of Florida returned a two-count indictment charging petitioner with Officer Horner's murder. J.A. 15-20. Count One charged petitioner with murdering Officer Horner with the intent to prevent him from communicating to a law enforcement officer information relating to the commission or possible commission of federal offenses, in violation of 18 U.S.C. 1512(a)(1)(C) and (3)(A), 1111, and 2. J.A. 15-17. The indictment identified the relevant federal offenses as the armed robbery of the Holiday Inn, in violation of 18 U.S.C. 1951; conspiracy to rob a bank, in violation of 18 U.S.C. 2113 and 371; possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g); and possession of cocaine and marijuana, in violation of 21 U.S.C. 844(a). J.A. 15-17. Count Two charged petitioner with murdering Officer Horner in the course of using and carrying a firearm during and in relation to crimes of violence, in violation of 18 U.S.C. 924(c)(1)(A) and (j)(1), 1111(a), and 2. J.A. 17-18.

At his jury trial, petitioner moved for a judgment of acquittal at the close of the government's case-in-chief, pursuant to Federal Rule of Criminal Procedure 29(a), solely on the ground that Gamble's testimony was not credible. J.A. 46. The district court denied the motion. *Ibid.* Following the court's charge to the jury, petitioner's counsel renewed his motion for a judgment of acquittal, stating simply that "I need to renew a motion that I made at the conclusion of the Government's case." J.A. 50. The court again denied the motion. *Ibid.*

The district court adopted the government's proposed jury instructions on the elements of the Section 1512(a)(1)(C) offense and instructed the jury as follows:

> [Petitioner] can be found guilty of [Count One] only if all of the following facts are proved beyond a reasonable doubt: First, that [petitioner] killed Christopher Todd Horner as charged and, second, that [petitioner] killed Christopher Todd Horner knowingly and willfully with the intent to prevent him from communicating information relating to the commission or possible commission of a federal offense to a law-enforcement officer or a judge of the United States.
>
> * * * * *
>
> Specifically, the Government[] alleges that the killing was done to prevent the communication by Christopher Todd Horner of information relating to one or more of the following federal offenses: One, the robbery of a Holiday Inn in violation of Title 18 U.S.C. Section 1951; two, a conspiracy to rob a bank in violation of Title 18 United States Code, Sections 1951, 2113, and 371; three, the possession of a firearm by a convicted felon in violation of Title 18 United States Code, Section 922(g); and/or four, possession of a controlled substance in violation of Title 18 [sic] United States Code, Section 844(a).

J.A. 59-60. The court then instructed the jury on the elements of each of those offenses. J.A. 60-66. Petitioner did not object to the government's proposed charge or request an alternative instruction to elaborate on any need for proof that information about the underlying federal crimes would have been transferred to federal law enforcement officers. J.A. 48; 6/13/2008 Tr.

111-117. The jury found petitioner guilty on both counts. J.A. 80. Petitioner was sentenced to life imprisonment on Count 1 and to a consecutive sentence of ten years of imprisonment on Count 2. *Ibid.*

4. The court of appeals affirmed. J.A. 76-86. Raising a specific sufficiency-of-the-evidence argument for the first time on appeal, petitioner challenged the sufficiency of the evidence to support his conviction under Section 1512(a)(1)(C). Petitioner did not dispute the evidence that he murdered Officer Horner. Rather, he argued that the government had failed to present evidence that the information Officer Horner might have obtained likely would have been transferred to *federal* law enforcement officers or that a *federal* investigation of the federal crimes involving petitioner and his associates was likely. The court rejected that contention, concluding that the statute did not require proof that a federal investigation was "ongoing, imminent, or likely," or that the victim "would have likely communicated information relating to the possible commission of a federal offense to federal authorities." J.A. 81. Citing its precedent and cases from other federal circuits, the court of appeals held that "the *possible* or *potential* communication to federal authorities of a possible federal crime is sufficient for purposes of section 1512(a)(1)(C)." J.A. 85. Applying that standard, the court found that "the federal nexus requirement was clearly satisfied" by the evidence that petitioner and the others in the group were in the process of committing, or had committed, numerous federal crimes—*i.e.*, they "were going to (or had already) engaged in armed robbery" and "had in [their] collective possession firearms, a stolen car, marijuana, and cocaine"—that "could have led to a federal investigation and prosecution." J.A. 85-86.

SUMMARY OF ARGUMENT

Petitioner was convicted of violating 18 U.S.C. 1512(a)(1)(C) by murdering Officer Christopher Todd Horner with the intent to prevent Officer Horner or others from communicating to federal law enforcement officials information about the commission or possible commission of various federal crimes. Petitioner contends that his conviction cannot stand because the government failed to prove that it was "likely" or "plausible" that information about the underlying federal offenses would have been communicated to federal, as opposed to state or local, law enforcement officials. He is incorrect both as to what the law requires and as to what the government proved in this case. Section 1512(a)(1)(C) is satisfied by proof of a reasonable possibility that one of the communications that a defendant prevented or intended to prevent by killing his victim would have been with a federal law enforcement official, and the government's evidence met that standard.

A. Congress enacted Section 1512(a)(1)(C) in order to protect the federal criminal justice system against the loss of evidence when potential witnesses and informants are murdered to silence them. The statute itself does not specify how likely it must have been that a communication prevented or intended to be prevented by the killing would have been with a *federal* officer. Petitioner offers various formulations of how certain that communication must be ("likely," "certain," "plausible") and relies primarily on cases linking that element (or other federal nexus elements) to either the defendant's or the victim's state of mind. But none of petitioner's formulations finds support in the structure or purpose of the statute.

First, any suggestion that the federal-officer element requires proof that the defendant intended to obstruct a communication with a federal officer specifically, or that he knew that his conduct would have such an obstructive effect, is refuted by the plain text of the statute. Subsection (g)(2) of Section 1512 specifies that, for all offenses punished by Section 1512, the government need not prove that the defendant had any particular state of mind with respect to the federal nature of the officer. Second, it would make little sense for Congress to link the federal-officer element to the state of mind or past conduct of the victim. The statute's express protection of relevant communications by "any person"—not just by the victim—precludes such a requirement. In addition, requiring that a victim already have communicated with federal officials would exclude protection of first time communications, a result that would undermine the statute's focus on a defendant's intent to "prevent" a covered communication.

In determining whether a defendant has violated Section 1512(a)(1)(C), a jury must make a predictive judgment—*i.e.*, whether the defendant's obstructive killing might have prevented a communication with a federal law enforcement official. In most instances, the statute protects communications that never occur. In determining whether a particular obstructive murder falls within the prohibition in Section 1512(a)(1)(C), a jury must determine whether it was reasonably possible that at least one of the communications that the murder prevented or was intended to prevent would have been with a federal law enforcement official. That possibility may be established with different types of evidence in different cases. Such a possibility must be realistic, as opposed to remote—*i.e.*, must be reasonable in light of the evidence and common sense. But the government need not prove that such a communication would definitely have occurred, or would more likely than not have occurred, absent the defendant's obstructive conduct. Such a high burden would frustrate Section 1512(a)(1)(C)'s purpose to protect the integrity of the federal criminal justice system, including *potential* future investigations and prosecutions.

B. Petitioner contends that principles of constitutional avoidance require the Court to adopt his restrictive reading of the federal-officer element. That is incorrect. Congress has broad authority under the Necessary and Proper Clause to enact legislation that rationally furthers an enumerated power. By criminalizing murders that interfere with the potential investigation and prosecution of federal crimes, Congress acted well within its constitutional authority. Congress can deter and punish threats to the integrity of the federal criminal justice system without requiring proof that such a threat was realized in every case. In enacting Section 1512(a)(1)(C), Congress did not criminalize all murders or otherwise upset the federal-state balance. Rather, Congress properly punished murders that are committed with the intent to obstruct the flow of information about federal crimes to law enforcement officials.

C. Petitioner's conviction should be affirmed because the government produced more than sufficient evidence to prove that one of the communications petitioner prevented by killing Officer Horner might have been with a federal law enforcement official. When petitioner killed Officer Horner, Horner was in the process of initiating communication with other local law enforcement officers about the federal crimes he was uncovering. Although Officer Horner was not able to complete that communication, the government presented evidence that, when local law enforcement officials later received information about those crimes from one of petitioner's co-conspirators, those officials transmitted the information to federal law enforcement officers, who investigated and prosecuted some of the crimes. The fact that local law enforcement officials communicated information about at least some of the crimes that were the subject of petitioner's obstruction to federal law enforcement officials is sufficient to establish a reasonable possibility that at least one of the communications petitioner prevented or intended to prevent would have been with a federal officer. Indeed, it is also sufficient to establish that such a communication was plausible or realistically likely; thus, petitioner is not entitled to a reversal of his conviction even under his view of the law.

ARGUMENT

PETITIONER WAS PROPERLY CONVICTED OF VIOLATING 18 U.S.C. 1512(a)(1)(C) BY KILLING ANOTHER PERSON WITH THE INTENT TO PREVENT THE COMMUNICATION OF INFORMATION ABOUT POSSIBLE OR ACTUAL FEDERAL CRIMES TO FEDERAL OFFICIALS

Section 1512(a)(1)(C) of Title 18 makes it illegal for anyone to "kill[ ] or attempt[ ] to kill another person, with intent to * * * prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." Petitioner does not contest that the evidence introduced at trial was sufficient to prove that he killed Officer Horner with the intent to prevent the communication of information relating to the commission or possible commission of various federal offenses to law enforcement officers. Petitioner contends instead that the government failed to prove with sufficient certainty that his murder of Officer Horner had the effect (or was intended to have the effect) of preventing the communication of such information to *federal* law enforcement officials. But the government established a reasonable possibility that petitioner's murder of Officer Horner prevented the communication of information related to federal crimes to a federal law enforcement official, and that is sufficient to establish that petitioner violated Section 1512(a)(1)(C).

Section 1512 does not specify how likely it must have been that at least one of the communications that was obstructed or intended to be obstructed would have been with a federal officer. The disagreement in this case boils down to whether the government must establish that such a communication *would* have happened or whether it is sufficient to establish that it *might* have happened. Given the structure and purpose of Section 1512 and related provisions, the government need only prove that such a communication might have happened—*i.e.*, that a reasonable possibility existed that one of the communications that the defendant intended to prevent would have been with a federal law enforcement official. A theoretical or remote possibility will not suffice; but the government need not prove that it was more likely than not that such a communication would have occurred.

A. The Federal-Officer Element In Section 1512(a)(1)(C) Requires Proof Of A Reasonable Possibility That The Victim Or Some Other Person Would Have Communicated With A Federal Law Enforcement Official

While petitioner generally asserts that the government must prove that information relating to a federal crime "would have been transferred" to a federal law enforcement official (Br. 2, 11), he offers a variety of formulations of how certain it must be that the communication would have occurred. Petitioner variously argues that such a communication must already have occurred (Br. 16, 20, 29 (arguing that an "actual communication" is required)), that it must be "likely" to occur (Br. 17, 20, 24, 26, 29, 33, 41), and that it must be "certain" to occur (Br. 16, 32).[1] He also relies (Br. 29-35) on cases holding that the government must prove a particular mens rea with respect to federal nexus elements in other statutes. But none of petitioner's formulations finds support in the statutory text, none comports with the purpose of the statute, and none makes sense in light of the predictive determination a jury is required to make in finding a defendant guilty of violating Section 1512(a)(1)(C). Rather, in determining what communications might have occurred had a defendant not killed his victim, a jury need only find that it was reasonably possible that one such communication would be with a federal law enforcement official.

1. The text of Section 1512(a)(1)(C) makes clear that a jury need not find that a defendant had any particular state of mind with respect to whether the communication he intended to prevent would involve a federal law enforcement officer

a. In order to obtain a conviction under Section 1512(a)(1)(C), the government must prove that a defendant killed someone with the intent to "prevent the communication by any person to a law enforcement officer * * * of the United States"—defined to mean a federal officer—"of information relating to the commission or possible commission of a Federal offense." 18 U.S.C. 1512(a)(1)(C), 1515(a)(4). The statutory language of course covers a defendant who kills someone with the *intent* to prevent a communication about a federal crime to a federal officer specifically (as opposed to a state or local officer). If the government introduces evidence of such an intent, that will be sufficient to sustain a conviction. But Congress made clear that the government need not prove either that a defendant had such an intent or that he knew that one result of his obstructive killing would be to prevent a communication with a federal officer: Section 1512(g) specifies that, for purposes of Section 1512 prosecutions generally, "no state of mind need be proved with respect to the circumstance * * * that the law enforcement officer is an officer or employee of the Federal Government." 18 U.S.C. 1512(g)(2).[2]

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[1] Petitioner does not challenge the district court's instructions to the jury in any respect, nor did he do so below. See J.A. 48.

Congress's decision not to require that a defendant have had any particular state of mind about the federal nature of the relevant officer is consistent with the general rule that "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute." *United States* v. *Feola*, 420 U.S. 671, 677 n.9 (1975) (holding that a defendant need not know that the individual he is assaulting is a federal officer in order to violate 18 U.S.C. 111's prohibition on assaulting federal officers). Because the "primary purpose" of such a jurisdictional element "is to identify the factor that makes" the criminalized conduct "an appropriate subject for federal concern," "[j]urisdictional language need not contain the same culpability requirement as other elements of the offense." *United States* v. *Yermian*, 468 U.S. 63, 68 (1984). Jurisdictional elements do not have the effect of "criminaliz[ing] otherwise innocent conduct." *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994); *Feola*, 420 U.S. at 685 ("The situation is not one where legitimate conduct becomes unlawful solely because of the [federal] identity of the individual or agency affected."); cf. *Liparota* v. *United States*, 471 U.S. 419, 426 (1985) (construing statute to include mens rea element in part because "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct."). Murdering an individual in order to prevent the communication to law enforcement of information about criminal conduct—indeed, murdering an individual for any reason—is not innocent conduct that becomes subject to criminal prohibition simply because one of the communications prevented by the killing might have been to federal officials. As this Court explained in *X-Citement Video*: "Criminal intent serves to separate those who understand the wrongful nature of their act from those who do not, but does not require knowledge of the precise consequences that may flow from that act once aware that the act is wrongful." 513 U.S. at 73 n.3.

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[2] Because no evidence was introduced at petitioner's trial that he specifically intended to obstruct a communication with a *federal* law enforcement officer, this case presents the question of how the government may prove a violation of the statute in the absence of such an intent.

b. The plain import of the statutory text is confirmed by its legislative history. Congress enacted Section 1512 in 1982 as part of the Victim and Witness Protection Act, with the broad purpose of protecting the integrity of the criminal justice system, including the investigation and prosecution of federal crimes. Pub. L.

No. 97-291, § 4(a), 96 Stat. 1249-1253; see *id.* § 2(b)(1), 96 Stat. 1248-1249 (purpose of Act is to "enhance and protect the necessary role of crime victims and witnesses in the criminal justice process"); see S. Rep. No. 532, 97th Cong., 2d Sess. 15 (1982) (*Senate Report*) (noting that intimidation of victims and witnesses "inherently thwarts the administration of criminal justice"). As originally enacted, Section 1512 prohibited, *inter alia*, "knowingly us[ing] intimidation or physical force, or threaten[ing] another person, or attempt[ing] to do so * * * with intent to * * * hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." § 4(a), 96 Stat. 1249 (Section 1512(a)). That provision was amended in 1986 (and codified as Section 1512(a)(1)(C)) to prohibit "kill[ing] or attempt[ing] to kill" a person with the requisite obstructive intent. Criminal Law and Procedure Technical Amendments Act, Pub. L. No. 99-646, § 61, 100 Stat. 3614; see 132 Cong. Rec. 11,291 (1986). Since the original enactment of Section 1512, Congress has specified that the relevant law enforcement official must be a federal law enforcement official. § 4(a), 96 Stat. 1252 (18 U.S.C. 1515). But Section 1512 has also always included the language now codified at 18 U.S.C. 1512(g), stating that the government need not prove any particular state of mind with respect to the federal identity of the relevant law enforcement entity. § 4(a), 96 Stat. 1250 (18 U.S.C. 1512(e)).

The statutory subsection now codified at Section 1512(g) originated in a House bill in 1982. H.R. 7191, 97th Cong., 2d Sess. (128 Cong. Rec. 26,357 (1982)) ("In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance * * * that the law enforcement officer is an officer or employee of the Federal Government."). Representative Rodino, one of the sponsors of the House bill, explained the purpose of including that provision:

> This provision is necessary because of the convention that the state of mind applicable to the conduct required for the offense also applies to any circumstances or results that are required. Because the term[] * * * "law enforcement officer" [is] defined in section 1515 to mean * * * a Federal officer * * * it would be necessary for the prosecution, absent this provision, to prove that the defendant knew the * * * law enforcement officer was * * * a Federal officer * * * . Since the * * * Federal status of the officer * * * [is a] matter[] that go[es] to the power of the Federal government to assert jurisdiction over conduct, rather than to the criminal nature of the conduct, it is neither necessary nor appropriate to require proof that the defendant knew the * * * officer * * * was a Federal * * * officer.

128 Cong. Rec. at 26,351. That explanation confirms the plain meaning of the text that, consistent with traditional rules governing jurisdictional elements in federal criminal statutes, a defendant need not have intended to prevent a communication with a federal officer in particular and need not have known that his act of killing would have that effect.

2. *Section 1512(a)(1)(C) does not require proof that a victim had already communicated with federal officials or that he had a subjective intent to do so in the future*

Petitioner argues (Br. 14-35) that, in order to prove that a defendant violated Section 1512(a)(1)(C), the government must establish that the killing prevented an "actual communication" or a "likely communication." Although petitioner does not specify what quantum or variety of evidence would meet that standard, his reliance on the Fifth Circuit's decision in *United States* v. *Causey*, 185 F.3d 407 (1999), cert. denied, 530 U.S. 1277 (2000), and the Second Circuit's decision in *United States* v. *Lopez*, 372 F.3d 86 (2004), cert. denied, 546 U.S. 827 (2005), indicates that he would require either that the victim already had established a connection with federal officials or that the victim subjectively intended to communicate with federal officials. Neither construction finds support in the statute and both would undermine the statute's purpose.

In *Causey*, the Fifth Circuit vacated the convictions of two police officers who had arranged the murder of a witness who had filed a police brutality complaint with the New Orleans Police Department against one of the defendants. 185 F.3d at 411. The court concluded that the evidence was insufficient to support the defendants' convictions under Section 1512(a)(1)(C) because there was no evidence that, before her death, the victim had either already communicated with federal law enforcement officials or intended to do so. *Id.* at 422-423. The Second Circuit reached a similar result in *Lopez*, overturning a Section 1512(a)(1)(C) conviction when the victim had contacted local law enforcement authorities about the defendant's criminal behavior but had not "turned to" federal officials or shown a subjective intent to do so. 372 F.3d at 92. To the extent petitioner reads *Causey* and *Lopez* to hold that the federal-officer element may be satisfied only through evidence of a victim's previous contact with federal authorities or a victim's subjective intent to initiate such contact, his construction in reliance on those cases places too narrow a gloss on Section 1512(a)(1)(C).[3]

Initially, petitioner's contention (Br. 26) that the government was required to prove a "nexus between [petitioner's] obstructive conduct and the transfer of information from Officer Horner to a Federal official" is incorrect. The statute does not require that the communication that the defendant intended to prevent would have come from the victim himself. The text of the statute prohibits killing someone with the intent to prevent "the communication by *any* person" of the relevant information to a law enforcement official. 18 U.S.C. 1512(a)(1)(C) (emphasis added). That prohibition protects all covered communications, regardless of whether they directly involve the victim. For example, the statute would punish the killing of a person with the intent to send a message to a third person that she should not share information about a federal crime with law enforcement officials.

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[3] Although petitioner characterizes the Second Circuit's holding in *Lopez* as adopting such a limited reading of the statute, the court in fact acknowledged that a broader swath of conduct could satisfy the federal officer nexus in Section 1512(a)(1)(C). See 372 F.3d at 91 (noting that the federal-officer nexus could be satisfied by "proof that the defendant had 'actual knowledge of the federal nature of the offense'" at issue); see *id.* at 90 ("The victim need not have agreed to cooperate with any federal authority or even to have evinced an intention or desire to so cooperate. There need not be an ongoing investigation or even any intent to investigate. Rather, the killing of an individual with the intent to frustrate the individual's *possible* cooperation with federal authorities is implicated by the statute.") (emphasis added) (quoting *United States* v. *Romero*, 54 F.3d 56, 62 (2d Cir. 1995), cert. denied, 517 U.S. 1149 (1996)).

Moreover, the text of the statute is not limited to the killing (or attempted killing) of a victim who has already communicated with federal officials about the federal crimes or possible federal crimes at issue. The statute punishes killings that are intended to *prevent* such communications, and it thereby refutes any suggestion that Congress excluded protection of first-time communications. See *Webster's Third New International Dictionary* 1798 (1986) (*Webster's*) (definition of "prevent" includes "to keep from happening or existing esp. by precautionary measures"); *Black's Law Dictionary* 1307 (9th ed. 2009) (*Black's*) ("prevent" means "[t]o hinder or impede"). Indeed, the facts of this case indicate the absurdity that would result from such a reading of the statute. Petitioner shot Officer Horner in the back of the head in order to prevent him from conveying to law enforcement officers information that Officer Horner was acquiring about the federal crimes of petitioner and his companions. If Congress intended to protect only victims who had already initiated contact with federal officials, efficient violators of Section 1512(a)(1)(C) such as petitioner would go unpunished.

Such a reading of the statute would also thwart its purpose of protecting the integrity of future and potential investigations of federal crimes. See *Senate Report* 14 ("Section 1512 applies to offenses against witnesses, victims, or informants which occur before the witness testifies or the informant communicates with law enforcement officers."). Thus, courts of appeals have uniformly held that a federal investigation need not be ongoing or imminent at the time of the killing to find a violation of the statute. See, *e.g.*, *United States* v. *Stansfield*, 101 F.3d 909, 918 n.4 (3d Cir. 1996); *United States* v. *Romero*, 54 F.3d 56, 62 (2d Cir. 1995), cert. denied, 517 U.S. 1149 (1996); see also *United States* v. *Serrata*, 425 F.3d 886, 897 (10th Cir. 2005); *United States* v. *Veal*, 153 F.3d 1233, 1249 (11th Cir. 1998), cert. denied, 526 U.S. 1147 (1999). That rule is consistent with the broader statute's prohibition of various types of conduct intended to obstruct an "official proceeding." See 18 U.S.C. 1512(a)(1)(A), (B), (2)(A), (B), (b)(1), (2), (c)(1), (2), and (d)(1). The statute specifically provides that such a proceeding "need not be pending or about to be instituted at the time of the offense," 18 U.S.C. 1512(f)(1), again confirming Congress's intent to protect the integrity of potential future federal investigations and proceedings.

No greater justification exists to condition federal jurisdiction on a victim's subjective intent to communicate with federal law enforcement officials. The only intent Congress required the government to prove in order to establish a violation of Section 1512(a)(1)(C) is the defendant's intent that killing his victim will prevent the communication of information about federal crimes to law enforcement officials. Given that the defendant need not have had communication to *federal* officials in mind, it would make no sense to require that a victim have had a subjective intent to communicate with federal officials at the time of his murder. Courts of appeals have consistently refused to read such a requirement into the statute. See, *e.g.*, *Romero*, 54 F.3d at 62; *United States* v. *Harris*, 498 F.3d 278, 286 (4th Cir. 2007), cert. denied, 552 U.S. 1281 (2008). Doing so would also be inconsistent with the provision's protection of a covered communication from "any person" to a law enforcement officer. If conviction turns on the victim's subjective intent to communicate with a federal official, a broad swath of killings plainly covered by the text of the statute—*e.g.*, killing a person's child in order to prevent the parent from sharing information with law enforcement officers—would be excluded.

Certainly, it will be easier for the government to prove a violation of Section 1512(a)(1)(C) when a victim has already cooperated with federal investigators or has expressed his subjective intent to do so. Indeed, petitioner identifies three cases in which courts of appeals held that the statutory elements were satisfied in part because there was on ongoing federal investigation at the time of the murder. See Br. 26-28 (citing *United States* v. *Rodriguez Marrero*, 390 F.3d 1 (1st Cir. 2004), cert. denied, 544 U.S. 912 (2005); *United States* v. *Bell*, 113 F.3d 1345 (3d Cir.), cert. denied, 522 U.S. 984 (1997); and *United States* v. *Emery*, 186 F.3d 921 (8th Cir. 1999), cert. denied, 528 U.S. 1130 (2000)). But Congress did not require the government to produce such evidence in every case and none of the cases petitioner cites holds otherwise. It is sufficient to satisfy the jurisdictional element that one of the communications actually prevented or intended to be prevented by the murder might have been with a federal official.

3. *In order to prove a violation of Section 1512(a)(1)(C), the government need only prove a reasonable possibility that information relating to a federal crime was prevented from reaching a federal law enforcement official*

a. Because Section 1512(a)(1)(C) does not require the government to prove any particular state of mind (of the defendant or the victim) as to the federal-officer element, that element describes a possible outcome from the obstructive killing, rather than its purpose. The central question in this case is how likely it must be that the killing in question had the effect of preventing the communication of information about a federal crime to a federal law enforcement official. The statute itself does not define the degree of likelihood required. But the statute does require that the intent of the unlawful killing was to *prevent* the communication at issue. Except in cases in which the defendant's goal was thwarted, therefore, the relevant communication will not occur. In determining whether the government satisfied the federal officer element in a particular case, a jury must make a hypothetical prediction about what might have occurred in the absence of the murder. Given the uncertainty inherent in making such a prediction, it is sufficient that a jury conclude that it was reasonably possible that one consequence of the killing in question was the prevention of a communication with a federal law enforcement officer about the commission or possible commission of a federal offense. In other words, the government must prove that such a federal communication might have occurred, but need not prove that it is more likely than not that it would have.[4]

Petitioner rightly points out (Br. 16) that "Congress did not use the word 'possible' at the beginning of subsection (C) before the word 'communication.'" But Congress did not use the words "likely," "certain," "realistically plausible," or "actual" either. Because the statute punishes murderous means of "keep[ing]" the relevant communications "from happening," see *Webster's* 1798 (defining "prevent"), it protects communications that never occur. The Court must therefore read some qualifier into the communication requirement. If the statute protected only actual communications, it would punish only unsuccessful attempts to obstruct the transmission of information about federal crimes to law enforcement officers and retaliation for past communications (which is covered under 18 U.S.C. 1513). Reading such a limit into the statute is clearly at odds with Congress's intent.

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[4] Courts of appeals have routinely held that the federal officer element in Section 1512(a)(1)(C) is satisfied when the evidence establishes a "possibility" that the information would have been communicated to a federal official. *E.g.*, J.A. 85 (holding that "*possible* or *potential* communication to federal authorities of a possible federal crime is sufficient for purposes of section 1512(a)(1)(C)"); *Harris*, 498 F.3d at 285-286 (upholding jury instruction stating that jury must find that there was a "possibility or likelihood" that information would have been communicated to federal official); *Romero*, 54 F.3d at 62 (Section 1512(a)(1)(C) implicates "the killing of an individual with the intent to frustrate the individual's possible cooperation with federal authorities"). Courts have applied the same standard in interpreting the similarly worded federal-officer requirement in 18 U.S.C. 1512(b)(3), which prohibits knowingly intimidating, threatening, or corruptly persuading another person with the intent to "hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense." *E.g.*, *United States* v. *Carson*, 560 F.3d 566, 580-581 (6th Cir. 2009), cert. denied, 130 S. Ct. 1048 (2010); *Serrata*, 425 F.3d at 897; *United States* v. *Baldyga*, 233 F.3d 674, 680 (1st Cir. 2000), cert. denied, 534 U.S. 871 (2001); *Veal*, 153 F.3d at 1251.

Petitioner criticizes the court of appeals' use of a "possible or potential communication" standard (J.A. 85 (emphases removed)), arguing (Br. 12, 17, 24, 26, 41) that it amounts to nothing more than a "theoretical possibility" standard. But such an argument ignores the general requirement in criminal trials that a jury's inference reasonably follow from the evidence presented. It is not enough, therefore, that a victim simply knew about the commission or possible commission of a federal crime without more; Section 1512 does not federalize the murder of all people who happen to have information about a federal crime. The statute requires that the defendant have had an obstructive intent in killing the victim. And the jury must have some evidentiary basis for concluding that the information the defendant intended to prevent from being communicated to law enforcement officials might have been communicated to a federal law enforcement official. A standard that looks to whether a reasonably possible consequence of the killing was to prevent communication about a federal offense to a federal law enforcement officer strikes the proper balance.

Criminal juries are often required to draw inferences or to make predictive judgments. See, *e.g.*, *James* v. *United States*, 550 U.S. 192, 207-208 (2007); *County Court* v. *Allen*, 442 U.S. 140, 156-157 (1979). In doing so, jurors are permitted to rely on "common sense and experience" in drawing reasonable conclusions. *Barnes* v. *United States*, 412 U.S. 837, 845 (1973); see *Schulz* v. *Pennsylvania R.R.*, 350 U.S. 523, 526 (1956) ("The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.") (internal quotation marks and footnotes omitted). When establishing a violation of Section 1512(a)(1)(C), the government presents sufficient evidence to satisfy the federal-officer element if a reasonable jury could conclude that a defendant's killing of a person might have prevented the communication of information about a federal crime to a federal law enforcement official. See *United States* v. *Diaz*, 176 F.3d 52, 91 (2d Cir.), cert. denied, 528 U.S. 875, and 528 U.S. 957 (1999).

Congress's intent that Section 1512(a)(1)(C) broadly protect the integrity of federal investigations and prosecutions is also confirmed by the broad reach of the provision's "federal crime" jurisdictional element. By protecting information about the commission of federal offenses and the *possible* commission of federal offenses, Congress opted not to require proof of certainty that a particular murder actually obstructed the investigation or prosecution of a federal crime. Rather, the statute applies to the communication of information about crimes that may never take place. See *Black's* 1284 (defining "possibility" as "[a]n event that may or may not happen"). No greater certainty—or likelihood—should be required when interpreting the federal-officer element.

b. As with any challenge to the sufficiency of evidence presented in a criminal trial, a determination of whether a statutory standard has been satisfied in a particular case will depend on the evidence presented in that case. *Bell*, 113 F.3d at 1350 n.4 (noting that the court "espress[ed] no opinion as to what types and what quantum of evidence satisfies" the federal-officer element because such an inquiry "by its nature will require careful, case-by-case analysis"). That unremarkable proposition is borne out in the courts of appeals' review of convictions under Section 1512(a)(1)(C). For example, courts have consistently held that the statute's federal-officer element is satisfied when the federal nature of the crimes at issue has been established and a federal investigation into such crimes was already underway at the time of the killing, regardless whether the defendant knew of the existence of the investigation or knew whether the victim had had any contact with such an investigation. *E.g.*, *Rodriguez-Marrero*, 390 F.3d at 13; *Emery*, 186 F.3d at 925; *Bell*, 113 F.3d at 1350; *United States* v. *Gonzalez*, 922 F.2d 1044, 1053-1054 (2d Cir.), cert. denied, 502 U.S. 1041 (1991).

But those cases involve a relatively easy application of Section 1512(a)(1)(C)'s federal-officer element, and courts of appeals have made clear that a federal investigation need not be underway or even contemplated at the time of the killing in order for the government to satisfy that nexus. See J.A. 81; *Stansfield*, 101 F.3d at 918; *Romero*, 54 F.3d at 62; accord *Serrata*, 425 F.3d at 897; *Veal*, 153 F.3d at 1249. In some cases, it will be sufficient that a defendant knew of the federal nature of his crime when he killed someone with the intent to prevent the communication to law enforcement officers of information about that crime. *E.g.*, *Stansfield*, 101 F.3d at 918; accord *United States* v. *Carson*, 560 F.3d 566, 581 (6th Cir. 2009), cert. denied, 130 S. Ct. 1048 (2010).

In other cases, the government may prove that the defendant intended to prevent a specific communication with a law enforcement body and that communication with such body might have resulted in communication to a federal officer of information the defendant intended to cover up. See *Bell*, 113 F.3d at 1349.

In some cases, when the other elements have been satisfied—*i.e.*, a defendant killed someone with the intent to prevent communication to a law enforcement officer about the commission of a federal crime—a jury may find that one such communication might be with a federal officer based on the distinctly federal nature of the underlying crime. See *Bell*, 113 F.3d at 1349 ("If an offense constitutes a federal crime, it is more likely that an officer investigating it would *be* a federal officer."); see also *Harris*, 498 F.3d at 286 n.5 ("[T]he federal nature of the offense at issue at least created the possibility that [the victim] might have decided in the future to contact federal authorities. * * * [A]lthough the local police had not referred to federal authorities information that [the victim] had provided in the past, the federal nature of the offenses created the possibility that they would decide to refer future information."). If, for example, the underlying crime involves the hijacking of a plane or a conspiracy to assassinate the President, the jury could reasonably conclude that federal law enforcement officials would be (or would have been) involved in the investigation and prosecution of the crime. Or, as petitioner notes (Br. 33), the government may introduce evidence that federal and state or local law enforcement officers have a regular practice of cooperating or sharing information either generally or with respect to a particular class of crimes. Cf. *Bartkus* v. *Illinois*, 359 U.S. 121, 133 n.22 (1959) (noting that, when Congress long ago made most bank robberies a federal crime, would-be bank robbers were put on notice that: "'flight,' their most valuable weapon, has, under the operation of the National Bank Robbery statute, proved quite impotent. The bank robbery rate has been cut in half, and there has been a fine relation between state and federal agencies in the apprehension and trial of bank robbers.") (quoting Interstate Commission on Crime, *Handbook on Interstate Crime Control* 114 (1938)).

4. Petitioner's reliance on this Court's decisions construing intent requirements in other statutes prohibiting other types of obstruction is misplaced

Although petitioner stops short of explicitly arguing that Section 1512(a)(1)(C) requires the government to prove that a defendant had a particular state of mind with respect to the federal-officer element, he relies on this Court's decisions in *Arthur Andersen LLP* v. *United States*, 544 U.S. 696 (2005), and *United States* v. *Aguilar*, 515 U.S. 593 (1995), to argue (Br. 29-35) that Section 1512(a)(1)(C)'s "nexus requirement" was not satisfied in this case. But the holdings of *Arthur Andersen* and *Aguilar* are not applicable to Section 1512(a)(1)(C), which expressly disavows the type of mens rea found applicable to the distinct statutory nexus elements at issue in those cases.

In *Arthur Andersen*, the Court construed the meaning of the phrase "knowingly * * * corruptly persuades" as used in 18 U.S.C. 1512(b)(2)(A) and (B) (2000), which prohibit, *inter alia*, "knowingly * * * corruptly persuad[ing] another person * * * with intent to * * * cause" such person to "withhold" documents from or alter documents for use in an "official proceeding." The Court first concluded that the mens rea implicit in the word "knowingly" applied to the act of "corruptly persuad[ing]" such that "[o]nly persons conscious of wrongdoing can be said to 'knowingly . . . corruptly persuad[e].'" 544 U.S. at 705-706. Turning to the type of proof needed to satisfy the "official proceeding" element, the Court held that, in order to prove that a defendant had knowingly corruptly persuaded someone to withhold documents from an official proceeding, the government was required to prove that the defendant had in mind a "particular official proceeding in which [the] documents [at issue] might be material." *Id.* at 707-708. In so holding, the Court in *Arthur Andersen* relied on its previous decision in *Aguilar*, in which the defendant was charged with violating 18 U.S.C. 1503 by "corruptly endeavor[ing] to influence, obstruct, and impede [a] . . . grand jury investigation." *Arthur Andersen*, 544 U.S. at 708 (quoting *Aguilar*, 515 U.S. at 599). The Court in *Aguilar* had similarly held that a defendant "lacks the requisite intent" to violate the statute if he "lacks knowledge that his actions are likely to affect" a particular judicial proceeding. 515 U.S. at 599; see *Arthur Andersen*, 544 U.S. at 708.

Petitioner would have this Court import the reasoning of *Arthur Andersen* and *Aguilar* into the distinct context of Section 1512(a)(1)(C), which does not require proof either that a defendant "corruptly" did anything or that the obstructive conduct at issue implicated an official proceeding. More to the point, the holdings of those cases require the government to prove that a defendant had a particular state of mind with respect to the particular federal proceeding that was the object of the defendant's obstructive conduct. Such a requirement cannot be read into Section 1512(a)(1)(C)'s federal-officer element because, as explained, Section 1512(g) expressly states that "no state of mind need be proved with respect to the circumstance * * * that the law enforcement officer is an officer or employee of the Federal Government." Although petitioner claims (Br. 35) that "the nexus requirements established by this Court in *Arthur Andersen* and *Aguilar* contradict the Eleventh Circuit opinion in the present case," it is not clear how that could be so when those cases held that a particular "state of mind need be proved with respect to" the "nexus requirements" at issue—a requirement Congress has specifically rejected with respect to the conduct of which petitioner was convicted.[5]

B. The Principle of Constitutional Avoidance Does Not Require This Court To Adopt Petitioner's Restrictive Reading Of Section 1512(a)(1)(C)'s Federal-Officer Element

Although not altogether clear, petitioner seems to invoke the clear statement principles of *Cleveland* v. *United States*, 531 U.S. 12 (2000); *Jones* v. *United States*, 529 U.S. 848 (2000); and *United States* v. *Bass*, 404 U.S. 336 (1971), to justify (Br. 35-41) his limited reading of Section 1512(a)(1)(C). Petitioner concedes (Br. 40) that Congress acted within its constitutional authority when it enacted Section 1512(a)(1)(C). Petitioner instead claims (Br. 37-41) that the Court should apply a form of constitutional avoidance by construing the statute to require proof of an "actual" or "likely" communication with a federal officer in order to avoid "upset[ting] the federal-state balance." Petitioner did not raise that argument in the court of appeals and is incorrect in any event.

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[5] Moreover, the Court in *Arthur Andersen* was motivated in part by a desire to avoid criminalizing otherwise innocent conduct through a federal nexus requirement. See 544 U.S. at 703-704. As discussed at p. 16, *supra*, such a concern is not relevant in this case, in which petitioner's obstructive conduct—*i.e.*, murder—was neither innocent nor innocuous.

As this Court has noted, when Congress criminalizes acts such as perjury and witness tampering, it does so "in furtherance of the power to constitute federal tribunals." *United States* v. *Comstock*, 130 S. Ct. 1949, 1958 (2010); *Jinks* v. *Richland County*, 538 U.S. 456, 462 n.2 (2003); *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 417 (1819)). Congress can similarly protect the integrity of the Executive Branch's investigation and prosecution of federal crimes. In doing so, Congress may seek to ensure that the transfer of information to federal law enforcement officers and judges about possible federal crimes is wholly unimpeded by those with obstructive intent. Cf. *Feola*, 420 U.S. at 676 n.9 ("[W]here Congress seeks to protect the integrity of federal functions and the safety of federal officers, the interest is sufficient to warrant federal involvement.").

Although petitioner is correct (Br. 39) that murder is generally a state law crime, Congress's prohibition of murders that have the potential to disrupt the integrity of federal investigations and prosecutions of federal crimes hardly "upset[s] the delicate balance between State and Federal powers" (Br. 36). Section 1512(a)(1)(C) does not rest on putative federal authority to prosecute all murders, or even all murders of individuals who possess information about the commission or possible commission of criminal activity. The statute is tailored to protect the integrity of the federal criminal justice system in three respects. First, it requires that the underlying crimes or possible crimes are federal offenses. Second, it requires that a defendant commit murder with the intent to prevent the communication of information about such federal crimes. Third, it requires some nexus with a federal law enforcement officer or judge.

The Necessary and Proper Clause of the Constitution, Art. I, § 8, Cl. 18, "grants Congress broad authority to enact federal legislation," including "laws that are 'convenient, or useful' or 'conducive' to the * * * 'beneficial exercise'" of an enumerated power. *Comstock*, 130 S. Ct. at 1956 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 413, 418). Pursuant to that broad authority, "Congress routinely * * * enact[s] criminal laws in furtherance of, for example, its enumerated power[] to * * * establish federal courts." *Id.* at 1957. Similarly, it routinely protects the integrity of investigations into federal criminal activity. See *United States* v. *Rodgers*, 466 U.S. 475, 481-482 (1984) (false statements to the Federal Bureau of Investigation or Secret Service are prosecutable under 18 U.S.C. 1001; Congress has a "valid legislative interest in protecting the integrity of [such] official inquiries, * * * an interest clearly embraced in, and furthered by, the broad language of § 1001") (internal quotation marks omitted). Congress did exactly that in criminalizing the conduct described in Section 1512(a)(1)(C), and that provision is "plainly adapted" to the end of protecting federal criminal investigations and prosecutions. See *McCulloch*, 17 U.S. (4 Wheat.) at 421.

In exercising its authority under the Necessary and Proper Clause, Congress is not limited to prohibiting murders that the government can prove actually prevented an identifiable communication with a specific federal law enforcement official. The Constitution does not demand a perfect fit between the federal interest and every possible application of a statute enacted to serve that interest. In *Sabri* v. *United States*, 541 U.S. 600 (2004), for example, this Court upheld a statute criminalizing the bribery of officials of government entities that receive at least $10,000 in federal funds. The court found the statute to be a valid exercise of Congress's authority under the Necessary and Proper Clause to effectuate its enumerated power under the Spending Clause, Art. I, § 8, Cl. 1, to appropriate money for the general welfare. *Sabri*, 541 U.S. at 604-608. Noting that Congress may use "rational means[] to safeguard the integrity of" federal spending, the Court rejected the defendant's argument that Congress should have required a direct connection between the proscribed bribe and the federal dollars that triggered federal jurisdiction. *Id.* at 605-606. As the Court explained in *Comstock*, "in aid of [Congress's] implied power to criminalize graft of 'taxpayer dollars,' Congress has the *additional* prophylactic power to criminalize bribes or kickbacks even when the stolen funds have not been 'traceably skimmed from specific federal payments.'" 130 S. Ct. at 1964 (quoting *Sabri*, 541 U.S. at 605-606).

Just as no "traceabl[e]" connection was required between the criminal conduct at issue in *Sabri* and the federal funds that Congress desired to protect, Congress was not limited in enacting Section 1512(a)(1)(C) to punishing intentionally obstructive murders that had the effect of preventing "actual" identifiable communications with federal officers. Rather, it is eminently rational to proscribe such murders when there is a reasonable possibility that they prevented a communication with a federal law enforcement official about a federal crime. *Sabri*, 541 U.S. at 605; *McCulloch*, 17 U.S. (4 Wheat.) at 354, 413, 421.

Thus, there is no merit to petitioner's contention (Br. 35) that construing Section 1512(a)(1)(C) as Congress intended—to prevent the obstruction of communications that might have been with federal law enforcement officers—would allow Congress to "exercise[] a general police power." It is true that this Court has expressed reluctance to interpret a statute to "'significantly change[] the federal-state balance' in the prosecution of crimes" unless Congress clearly expresses its intent to do so. *Jones*, 529 U.S. at 858 ((quoting *Bass*, 404 U.S. at 349); see *Cleveland*, 531 U.S. at 24. But that legitimate concern is not implicated by Section 1512(a)(1)(C) because it is appropriately targeted to prohibit conduct that poses a potential threat to federal law enforcement, and because it does not reach murders that lack that federal link.

C. Under Any Understanding Of Section 1512(a)(1)(C)'s Federal-Officer Element, Petitioner's Conviction Is Valid

The government was not required to prove that petitioner's murder of Officer Horner prevented an actual or likely communication with a federal official about the commission of a federal offense. The government was required to prove that petitioner killed Officer Horner with the intent to prevent any person's communication to a law enforcement official of information relating to the commission or possible commission of a federal crime, and that it was reasonably possible that such a communication would have been with a federal law enforcement official. The government clearly met that burden.[6]

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[6] Although petitioner asks this Court to reverse his conviction for violating 18 U.S.C. 1512(a)(1)(C) based on purported insufficiency of

Petitioner does not contest the jury's finding that he killed Officer Horner with the intent to prevent the communication to other law enforcement officers of information about the commission or possible commission of federal crimes. Petitioner and his companions had recently committed federal crimes, were in the process of committing other federal crimes, and were planning to commit still others in the near future when Officer Horner came upon them in the cemetery. Christopher Gamble testified that, when petitioner snuck up on and overpowered Officer Horner, the officer was in the process of contacting other law enforcement officers in order to discover additional information about the men gathered in the cemetery and to request assistance. J.A. 28, 35-37, 43-44, 78. Although the communication Officer Horner was on the verge of initiating when petitioner subdued and then killed him was with local (rather than federal) law enforcement officers, it was reasonable for the jury to conclude that information about the federal offenses at issue ultimately might have been communi-

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evidence, he does not dispute that he failed to present such a claim in the district court. Indeed, petitioner failed to present any claim in the district court about the proper interpretation of any element of Section 1512(a)(1)(C). This Court must therefore review his sufficiency claim under the plain-error standard. Fed. R. Crim. P. 52(b); see *Clyatt* v. *United States*, 197 U.S. 207, 221-222 (1905); see also, *e.g.*, *United States* v. *Goode*, 483 F.3d 676, 681 (10th Cir. 2007) ("When a defendant challenges in district court the sufficiency of the evidence on specific grounds, all grounds not specified in the motion are waived.") (internal quotation marks and citation omitted). Petitioner cannot overcome the plain-error hurdle because he cannot identify any error, let alone one that was plain. In addition, because the government presented sufficient evidence to satisfy the federal-officer element whatever that element is construed to require, petitioner cannot demonstrate prejudice and is therefore not entitled to relief.

cated to federal officers and that petitioner prevented or intended to prevent such communication.

Because Section 1512(a)(1)(C) does not require that the victim himself be the one who might have communicated with a federal officer, the relevant inquiry is whether information relating to the underlying federal crimes might have been communicated by any person to federal officers. That standard was easily satisfied in this case. Petitioner is incorrect in asserting (Br. 13; see Br. 25-26) that "the Government presented no evidence at all to suggest that a Federal agency played any part in the investigation of" the Holiday Inn robbery. In 2002, petitioner's co-conspirator Christopher Gamble provided information to local law enforcement officers about various offenses, including the Holiday Inn robbery he had committed hours before meeting up with petitioner and traveling to Oakland Cemetery on March 3, 1998. 6/12/2008 Tr. 172-184. Local law enforcement officers subsequently transmitted information about that robbery—a federal offense under 18 U.S.C. 1951—to federal officials, who opened an investigation. 6/12/2008 Tr. 184-189. Gamble also provided information to local, and then to federal, law enforcement officers about the group's plan to rob a NationsBank and about the events in Oakland Cemetery on the morning of March 3, 1998, including the murder of Officer Horner. *Id.* at 172-184. Gamble ultimately testified about his crimes before a federal grand jury, which returned a 14-count indictment against him including for crimes related to the Holiday Inn robbery. 6/11/2008 Tr. 181-188; 6/12/2008 Tr. 184-189.

When petitioner killed Officer Horner, Horner was in the process of initiating communication with a local law enforcement agency about the underlying federal crimes. Petitioner prevented that communication. But when local law enforcement officers later received that information from Gamble, they passed it on to federal law enforcement officials. That is sufficient to prove that it was reasonably possible that at least one communication that petitioner intended to obstruct when he killed Officer Horner would have been with federal officials. The government need not prove that it was more likely than not that such a communication would have happened, or would have happened sooner, absent the murder. It was reasonable for the jury to conclude that such a communication between local and federal officers might have happened based on the fact that it did happen when the local officers later obtained the information petitioner sought to suppress through other channels.

In addition, the local law enforcement officer to whom Gamble eventually confessed testified that he collected all of the police reports about Gamble's armed robberies in the course of providing information to federal officers. 6/12/2008 Tr. 185-186, 193-194. Had Officer Horner not been killed by petitioner, any report he would have prepared concerning the activities of petitioner and his companions might have been transmitted to federal authorities. In that sense, too, petitioner's murder of Officer Horner prevented a possible communication with federal officers.

Even if petitioner were correct that the government was required to prove that a communication with a federal officer was "plausib[le]" or "realistic[ally] likel[y]" (Br. 41), the government satisfied that standard as well. No one can know with absolute certainty whether Officer Horner or his colleagues would have informed federal officials about the federal crimes Officer Horner uncovered if he had not been murdered. But the jury knew that local officials did pass such information to federal officials when they received it. The jury was entitled to conclude on that basis that it was plausible or realistically likely that, when petitioner killed Officer Horner in order to prevent him from communicating with law enforcement about the federal crimes at issue, one of the communications he prevented or intended to prevent would have been with a federal officer. Accord *United States* v. *Ronda*, 455 F.3d 1273, 1285 (11th Cir. 2006) (with respect to offense under Section 1512(b)(3), "the evidence at trial showed that [defendant's] misleading information was not only 'likely' to be transferred to federal investigators, it in fact was transferred to federal investigators"), cert. denied, 549 U.S. 1212 (2007).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 1503 provides:

Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is—

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

2. 18 U.S.C. 1512 provides:

Tampering with a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to—

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to—

(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(3) The punishment for an offense under this subsection is—

(A) in the case of a killing, the punishment provided in sections 1111 and 1112;

(B) in the case of—

(i) an attempt to murder; or

(ii) the use or attempted use of physical force against any person;

imprisonment for not more than 30 years; and

(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 20 years.

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation[1] supervised release,,[1] parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than 20 years, or both.

(c) Whoever corruptly—

---

[1] So in original.

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation[2] supervised release,,[2] parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than 3 years, or both.

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

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[2] So in original.

(f) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(k) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

3. 18 U.S.C. 1515 provides in pertinent part:

Definitions for certain provisions; general provision

(a) As used in sections 1512 and 1513 of this title and in this section—

* * * * *

(4) the term "law enforcement officer" means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant—

(A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or

(B) serving as a probation or pretrial services officer under this title;

* * * * *

REPLY
BRIEF

Supreme Court, U.S.
FILED
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No. 10-5443

In The
Supreme Court of the United States

◆

CHARLES FOWLER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

◆

REPLY BRIEF FOR PETITIONER

◆

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QUESTION PRESENTED

1. Whether a defendant may be convicted of murder under 18 U.S.C. §1512(a)(1)(C) without proof that information regarding a possible Federal crime would have been transferred from the victim to Federal law enforcement officers or judges.

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ARGUMENT IN REPLY

1. Introduction.

A Grand Jury empanelled in the Tampa Division of the Middle District of Florida indicted the Petitioner on September 19, 2007, and accused him of murdering Officer Christopher Horner of the Haines City Police Department "[o]n or about March 3, 1998." The Grand Jury alleged that the Petitioner violated 18 U.S.C. §1512(a)(1)(C) by committing the murder "with the intent to prevent the communication by *Officer Horner* to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a federal offense. . . ." See Indictment, J.A. 15-16. (italics added) The Indictment identified six Federal crimes that the Petitioner and his companions allegedly had committed or were preparing to commit on the morning of March 3, 1998.

The Petitioner was tried in June of 2008 (ten years after the alleged murder of Officer Horner), and a jury found him guilty of violating both §1512(a)(1)(C) and §924(C)(1)(a). The Petitioner appealed his conviction under §1512(a)(1)(C), and argued to the United States Court of Appeals for the Eleventh Circuit that the Government had failed to present any proof that Officer Horner would have communicated any information to a Federal officer if he had not been killed on the morning of March 3, 1998.

The Eleventh Circuit affirmed the Petitioner's conviction on April 14, 2010, and held that the Government was not required to prove that Officer Horner would have communicated with a Federal officer. According to the Eleventh Circuit, "the *possible* or *potential* communication to federal authorities of a possible federal crime is sufficient for purposes of section 1512(a)(1)(C). . . ." See Eleventh Circuit's Opinion, J.A. 76, 85. (italics in original)

This Court granted the Petitioner's Petition for Certiorari on November 15, 2010. The Petitioner filed his Merits Brief on January 12, 2011. The Government filed its Brief on February 25, 2011.

The Government has acknowledged that the Eleventh Circuit's formulation was erroneous. The Government has not stated anywhere in its Brief that the Eleventh Circuit was correct in allowing a conviction under §1512(a)(1)(C) to stand on nothing more than a "possible or potential communication." The Government has attempted to distance itself from the decision under review and has stated that a "theoretical or remote possibility will not suffice. . . ." See Government Brief, page 13.

Instead, the Government has proposed a standard which arguably is somewhat more demanding than the Eleventh Circuit's. The Government has asserted that §1512(a)(1)(C) "is satisfied by proof of a *reasonable possibility* that one of the communications that a defendant prevented or intended to prevent by killing his victim would have been with a federal law enforcement official. . . ." See Government's Brief, page 9. (italics added)

The Government has also claimed that its proposed standard has been fulfilled by the transfer of information four years after the death of Officer Horner. For that reason, the Government argues, the Petitioner's conviction should be affirmed. See Government's Brief, pages 39-40.

The Petitioner asserts in Reply that the Government's "reasonable possibility" standard conflicts with the text of §1512(a)(1)(C) and should be rejected as a guide for District Courts in determining whether there is sufficient evidence of a communication to a Federal officer.[1]

Furthermore, the Government's reliance on events that occurred four years after the death of

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[1] The Government has mentioned in its Brief that the Petitioner raised his sufficiency argument for the first time on appeal to the Eleventh Circuit. See Government Brief, p. 6. The Government made the same contention in its Brief to the Eleventh Circuit (pgs. 9-11, 13) and in its Response (pg. 5) to the Petitioner's Petition for Certiorari. The Eleventh Circuit, however, fully addressed the Petitioner's sufficiency arguments on the merits in its decision of April 14, 2010. See Eleventh Circuit decision, J.A. 76 et seq. Under these circumstances, the grant of the Petition for Certiorari signifies that this Court "necessarily considered and rejected that contention as a basis for denying review." See *United States v. Williams*, 504 U.S. 36, 40 (1992). This Court's traditional rule "precludes a grant of certiorari only when 'the question was not pressed or passed upon below.'" Id., at 40. The sufficiency issue was both pressed and passed upon in the Eleventh Circuit.

Officer Horner leads to absurd results, not the least of which would be the almost indefinite postponement of a completed offense under §1512(a)(1)(C). The likelihood of a communication between an informant and a Federal officer should be determined by the circumstances at the time of the victim's death and not at some unknown point in the future.

2. The reasonably possible standard conflicts with the text of §1512(a)(1)(C).

Congress has already dealt with the subject of "possibilities" in §1512(a)(1)(C). The word "possible" appears in one place, as an adjective to modify the word commission. Section 1512(a)(1)(C) makes it a crime to kill another person to "prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or *possible* commission of a Federal offense. . . ." (italics added)

In contrast, Congress did not qualify "communication" with the word "possible" or any other modifier. Although Congress arguably could have treated "communication" in the same way that it treated "commission" and inserted the word "possible" as an adjective, it clearly chose not to do so. The presence of the word "possible" in one part of the statute and its absence from another part cannot be passed off as a mere inadvertence. The disparate treatment is intentional.

This Court has recognized its "duty to refrain from reading a phrase into the statute when Congress has left it out. [W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted)." See *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). (internal quotations omitted) In the context of §1512(a)(1)(C), Congress intended that the communication between the informant and Federal officer would be certain or likely, not merely possible or reasonably possible.

3. Information obtained by the Government in 2002 may not supplant the circumstances that existed as of March 3, 1998.

The Government has contended that it fulfilled its "reasonably possible" standard in 2002 when Christopher Gamble (who was sentenced in 2001 to 20 years in the Florida state prison system for a 1999 robbery of a liquor store) provided local law enforcement officers with information which they in turn delivered to their Federal counterparts.[2] See Government Brief, pages 12, 37-40. The Government asserts that this transfer of information establishes the Federal nexus necessary under §1512(a)(1)(C).

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[2] As a reward for his cooperation in the Federal prosecutions, Gamble received a reduction in his Federal sentence from life to 185 months on November 25, 2008. See *U.S. v. Gamble*, 8:04-CR-04-T-30TGW (MDFL) Doc. 52.

The Government's attempt to rely on the transfer of information in 2002 is flawed for at least three reasons. First, the Government has contradicted the allegations of the Indictment by arguing that the communication element of §1512(a)(1)(C) did not occur until 2002. Second, the likelihood of a transfer of information should be determined according to the circumstances in effect at the time of the obstructive conduct, and not at some indefinite point in the future. Third, convictions under §1512(a)(1)(C) will be virtually automatic if the Government is allowed to substitute the receipt of information at some unknown point in the future for the circumstances that existed when the obstructive conduct occurred.

3(a). Postponing the communication element until 2002 contradicts the Indictment in this case.

The Grand Jury accused the Petitioner of violating §1512(a)(1)(C) on March 3, 1998. The Indictment alleged in relevant part:

> On or about March 3, 1998, in the Middle District of Florida, the defendant . . . with malice aforethought, did unlawfully, willfully, deliberately, maliciously, and with premeditation, kill Haines City Police Officer Christopher Todd Horner . . . with the intent to prevent the communication by Officer Horner to a law enforcement officer or judge of the United States of information relating

> to the commission or possible commission of a federal offense, namely that:
>
> [six federal crimes are specified]
>
> All in violation of Title 18, United States Code, Sections 1512(a)(1)(C), 1512(a)(3)(A), 1111, and 2.

See Indictment, J.A. 15-17.

The Fifth Amendment of the United States Constitution provides in relevant part, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." The Sixth Amendment provides in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ."

An indictment must "contain [ ] the elements of the offense intended to be charged, and sufficiently apprise[ ] the defendant of what he must be prepared to meet. . . ." See *Russell v. United States*, 369 U.S. 749, 764 (1962), (citations and internal quotation marks omitted) "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' *United States v. Carll*, 105 U.S. 611, 612 (1882)." *Hamling v. United States*, 418 U.S. 87, 117 (1974).

According to the Indictment in the case at bar, the violation of §1512(a)(1)(C) occurred on March 3, 1998. All elements of the charged offense – including the prevention of the communication between Officer Horner and Federal agencies – should have been fulfilled as of that date. Now, however, the Government has contradicted the Indictment and is claiming that the communication which the Petitioner allegedly prevented would not have occurred until 2002, as opposed to some time in early March of 1998. The Government's position is contrary to the plain language of the Indictment.

The Government also is contradicting the Indictment in an additional way. Although the Indictment alleged that Petitioner killed Officer Horner "to prevent the communication by *Officer Horner* to a law enforcement officer," the Government now has taken the position that the communication element can be fulfilled by any person who transferred information to the Federal agents.

According to the Government, "Because Section 1512(a)(1)(C) does not require that the victim himself be the one who might have communicated with a federal officer, the relevant inquiry is whether information relating to the underlying federal crimes might have been communicated by *any* person to federal officers. That standard was easily satisfied in this case." See Government's Brief, page 38. (italics added)

The Petitioner disagrees with the Government's assertion. There is no question that §1512(a)(1)(C) applies to cases where the defendant kills one person for the purpose of preventing another person from communicating with Federal officers. Ergo, the killing of a spouse to prevent the other partner from communicating with Federal officers undoubtedly is criminalized under §1512(a)(1)(C).

However, the Grand Jury specified that the killing of Officer Horner was perpetrated for the purpose of preventing *Officer Horner* from communicating with Federal officers.[3] The Government should not be permitted to ignore the Indictment and shift the communication inquiry to other law enforcement personnel who transferred information to Federal agents four years later. The Indictment pleads otherwise.

In a similar vein, the Government has argued that it "was required to prove that petitioner killed Officer Horner with the intent to prevent *any person's* communication to a law enforcement official. . . ." Government Brief, p. 36. (italics added) The Indictment specified only Officer Horner. It did not refer to any other person whose communication was allegedly thwarted. The Government should not be permitted to ignore the allegations of the Indictment or steer the inquiry away from the circumstances that existed in March of 1998.

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[3] The Government has stated in its Brief (p. 8) that the Petitioner did not dispute the evidence that he murdered Officer Horner. To the contrary, the Petitioner presented evidence at trial that Officer Horner had committed suicide and that the Petitioner was home at the time of Officer Horner's death in the Oakland Cemetery. See Petitioner's Merits Brief, pp. 7-8. While understanding that the jury found him guilty of murdering Officer Horner, the Petitioner continues to maintain that he is innocent.

3(b). Circumstances at the time of the obstructive conduct should determine whether the communication would have occurred.

Appellate decisions which have analyzed §1512(a)(1)(C), or comparable subsections of §1512, have concentrated on the circumstances at the time of the killing or other obstructive conduct to determine whether a communication with Federal officers would have occurred. In *United States v. Lopez*, 372 F.3d 86 (2d Cir. 2004), the Second Circuit reversed a conviction under §1512(a)(1)(C) because there was no evidence that the victim ever contemplated going to Federal officers for protection from the defendant. See *Lopez*, 372 F.3d at 92. The Second Circuit refused to speculate as to what might occur at some point in the indefinite future: "It is always possible that Montalvo [the victim] *someday* 'might' have turned to federal officials; but the range of things he 'might' do is limitless, and no evidence in the record connects this possibility with reality." Id., at 92. (italics added)

In the converse situation, the Second Circuit affirmed the conviction under §1512(b)(3) of a gang leader who had ordered the beating of a suspected informant in *United States v. Diaz*, 176 F.3d 52 (2d Cir.), cert. denied, 528 U.S. 875, and 528 U.S. 957 (1999). The defendant in *Diaz* ordered the beating at a time when

> federal authorities were in fact working closely with local police on a massive federal investigation of the gang's drug activities. Therefore, we find that a jury could reasonably have inferred from this evidence that if the potential informant communicated with the local police concerning Latin King activities constituting federal offenses, at least one of his communications would have been with a federal law enforcement officer. Accordingly, we conclude that there was sufficient evidence to satisfy the federal jurisdictional element of §1512(b)(3).

Id., at 90.

Lopez and *Diaz* illustrate that the likelihood of a communication between the informant and the Federal officer is determined by the circumstances which exist when the obstructive conduct takes place. In the present case, there is no evidence that a communication would have occurred between Officer Horner and Federal officers in March 1998, and the Government has not suggested anything to the contrary in its Brief. The Government's attempt to substitute a different set of circumstances that arose in 2002 is completely at odds with the law as expressed in *Lopez* and *Diaz*.

3(c). The Government's approach would eliminate a defense and guarantee a conviction in every prosecution under §1512(a)(1)(C).

The Government's position would automatically assure a conviction every time it prosecuted a defendant for violating §1512(a)(1)(C). Every prosecution under §1512(a)(1)(C) inevitably is based on actions taken by Federal officers who at some point have received information about Federal crimes and have linked this information to a person's death. If the Federal Government's eventual discovery of the information can be used in place of the circumstances that existed at the time of the victim's death, the defendant no longer will be able to defend by demonstrating that the victim would not have communicated with Federal officers.

Once again, the Second Circuit's decision in *Lopez* illustrates the fallacy in the Government's approach. In describing the background of the *Lopez* case, the Second Circuit stated that Federal law enforcement officials learned of the murder eight years after it had occurred. The Second Circuit explained, "In early 1999, the Federal Bureau of Investigation and the New York City Police Department learned through a cooperating witness, Victor Cruz, that Carlos Lopez murdered an individual named Edward Montalvo in 1991 and that from 1989 through 1996 Lopez led a violent crew of crack cocaine dealers operating principally in the vicinity of a flower shop in the East New York section of Brooklyn, New York. . . ." See *Lopez*, 372 F.3d at 88.

If the Government's position were to be accepted by this Court, the FBI's receipt of the information in 1999 would constitute the "communication" for purposes of §1512(a)(1)(C) and, ipso facto, prove that Mr. Montalvo would have gone to the FBI in 1991 if Lopez had not killed him (This is classic bootstrapping). A prosecution under §1512(a)(1)(C) no longer would be concerned with circumstances of communication with Federal agents as they existed at the time of the obstructive conduct.

The Government's proposal would lead to an absurd result barring the accused from defending on the basis that the victim would not have communicated with Federal agents. A statute should receive a "sensible construction" that avoids an "absurd conclusion." See *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 346 (1998), citing *United States v. Granderson*, 511 U.S. 39, 56 (1994).

Section 1512(a)(1)(C) should be interpreted sensibly so as to require the Government to prove beyond a reasonable doubt that the obstructive act prevented a communication that otherwise would have occurred between the informant and a Federal agent. The proof should relate only to the circumstances that existed at the time of the obstructive act and not at some indefinite point in the future. The Government's proposal ignores the circumstances that existed at the time of Officer Horner's death, fosters an absurd interpretation of §1512(a)(1)(C); and should be rejected.

For all of the foregoing reasons – the disregard for the Indictment, the effort to sidestep the circumstances that existed at the time of Officer Horner's death, and the absurd meaning that would hopelessly distort §1512(a)(1)(C) – this Court should reject the Government's argument that the information transferred in 2002 fulfills the communication element of the statute.

4. The Government has relied upon numerous appellate decisions in which Federal agents already were investigating at the time of the obstructive conduct. The facts of those decisions defeat any contention that reasonable possibility is a proper standard in determining whether the Government has presented sufficient evidence.

The Government has cited numerous appellate court decisions which have analyzed §1512(a)(1)(C) or other subsections of §1512. The Government has declared that "Courts of appeals have routinely held that the federal-officer element in Section 1512(a)(1)(C) is established when the evidence establishes a 'possibility' that the information would have been communicated to a federal official." See Government Brief, page 25, fn. 4.

Contrary to the Government's assertion, the vast majority of Circuit Court decisions cited in its Brief have emphasized that Federal law enforcement agents were already involved or were certain to become involved when the defendant in each case committed an obstructive act in violation of §1512. The facts in these cases established that the Federal agencies were involved, and reliance on possibilities was entirely unnecessary.

In *United States v. Diaz*, 176 F.3d 52 (2d Cir.), cert. denied, 528 U.S. 875 and 528 U.S. 957 (1999), a leader of the Latin Kings in Connecticut directed another member of the organization to "impose discipline" upon a person believed to be cooperating with the New Haven police. The leader, Nelson Millet, was in Federal prison when he issued his order. "At the time of Millet's conversations with J. Rodriguez [the other member], there was an extensive *federal* investigation underway of the Latin Kings. The investigation was being conducted by a task force which included the *FBI, the Drug Enforcement Administration*, the Connecticut State Police, as well as the New Haven and Bridgeport Police Departments." Id., at 90. (italics added)

Millet eventually was indicted and convicted on a wide array of Federal charges, including obstruction of justice in violation of §1512(b)(3) as a result of the beating perpetrated upon the suspected informant. The Second Circuit affirmed the conviction and rejected Millet's claim of insufficient evidence. The active participation of Federal agencies in the Latin Kings investigation played a large part in the Second Circuit's decision:

> In this case, the government presented sufficient evidence for a jury to reasonably conclude (1) that Millet intended to prevent Garcia [the suspected informant] from communicating with local police because he feared that Garcia would provide information on the Latin Kings' racketeering activities, which clearly constitute federal offenses; (2) that Millet knew federal authorities could record his telephone conversations with J. Rodriguez; and (3) *at the time of these conversations, federal authorities were in fact working closely with local police on a massive federal investigation of the gang's drug activities*. Therefore, we find that a jury could reasonably have inferred from this evidence that if the potential informant communicated with the local police concerning Latin King activities constituting federal offenses, at least one of his communications would have been with a federal law enforcement officer. Accordingly, we conclude that there was sufficient evidence to satisfy the federal jurisdictional element of §1512(b)(3).

Diaz, 176 F.3d at 91. (italics added)

In *United States v. Stansfield*, 101 F.3d 909 (3d Cir. 1996), the defendant's house was destroyed by arson in 1990. Initially, the property insurer and state law enforcement officials investigated. In September of 1993, the insurer "referred the matter to federal postal inspectors. The Postal Inspector presented the case to the United States Attorney's Office, which requested that the Postal Inspection Service continue the investigation." Id., at 911. The obstructive conduct occurred the following month, October of 1993, when the defendant physically beat and terrorized a witness and the witness's parents. Id., at 911-912. Again, there was significant evidence of Federal law enforcement involvement at the time of the offense presented to the jury.

In *United States v. Baldyga*, 233 F.3d 674 (1st Cir. 2000), the defendant's convictions arose from a drug "investigation begun by state and local authorities in Webster, Massachusetts, in January of 1998. The federal Drug Enforcement Administration (DEA) joined the investigation in February, 1998." A cooperating witness named Richard Chenevert already had made three controlled buys of cocaine from the defendant in January and February of 1998. Id., at 678.

Chenevert "testified that on March 1, 1998, he agreed with local and federal law enforcement authorities to do a fourth controlled buy of cocaine from Baldyga." The obstructive conduct occurred on the night of March 1 when Baldyga discovered that Chenevert was wired with a listening device. Id., at 678-79. By that time, the Federal DEA had already been involved in the investigation for at least a month. Again, the jury heard evidence of significant Federal law enforcement involvement.

In *United States v. Romero*, 54 F.3d 56 (2d Cir. 1995), cert. denied, 517 U.S. 1149 (1996), the defendant, Eugene Romero, was serving a Federal prison sentence for possession of heroin with intent to distribute and RICO conspiracy. Despite being in Federal custody, the defendant "continued to supervise his [drug trafficking] organization while in prison. . . ." Id., at 59.

Romero ordered the killing of a high-level assistant, Warren Tyson, for the very reason that Tyson was believed to be "cooperating with federal authorities." Id., at 59. When there is direct evidence that the defendant has ordered the killing of a person because of his suspected cooperation with Federal agents, the intent element under §1512(a)(1)(C) is readily fulfilled. Speculation as to possible Federal involvement is unnecessary when there is explicit evidence of the Defendant's actual intent to kill someone to prevent that person's cooperation with the Government. Again, significant evidence of Federal law enforcement involvement was presented to the petit jury.

In *United States v. Carson*, 560 F.3d 566 (6th Cir. 2009), cert. denied, 130 S.Ct. 1048 (2010), several members of the Mount Clemens (Michigan) Police Department assaulted a man named Robert Paxton. The police officers then were indicted in Federal court for depriving the assault victim of his civil rights and obstruction of justice. Id., at 570.

One of the officers, Peter Jacquemain, appealed his conviction for obstruction of justice in violation of §1512(b)(3). The conviction was based on a misleading report that Officer Jacquemain had submitted to his department on the night of the assault.

He contended that because a Federal investigation did not begin until six months later, there was insufficient evidence to prove beyond a reasonable doubt that he intended to hinder, delay, or prevent the communication of information to a Federal official. Id., at 581.

The Sixth Circuit, however, affirmed the conviction on the strength of evidence which proved that Officer Jacquemain was well aware that he could be prosecuted under Federal law for using excessive force. "At trial, the government read into evidence a joint stipulation stating that the training given to all officers in Michigan 'included instruction that if officers use excessive force they could be prosecuted in state or federal court.' The government also introduced into evidence Jacquemain's community college transcript and police academy training records, which indicate that he had received this training." Id., at 581. In the case at bar, the Government offered no evidence that Officer Horner or any other member of the Haines City Police Department shared information with Federal law enforcement officials or was trained to do so.

The foregoing survey of cases cited by the Government demonstrates that the Courts of Appeals did not have to rely on mere possibility or even a reasonable possibility that a communication with Federal law enforcement officers would occur. As a matter of fact, in each of the cases analyzed above, communications already had taken place or were entirely likely to occur.

To the extent that the Courts of Appeals used the term "possible" in describing the quantum of proof necessary to establish a Federal nexus, their comments were dicta. In *Baldyga*, where the defendant challenged his conviction by arguing that Federal authorities were not listening to the device that the cooperating witness was wearing when he made his controlled buy, the First Circuit rejected the defendant's "claim because §1512 does not require that the witness's communication with federal officers be as imminent as Baldyga suggests. Instead, other circuits have read the statute to require only a possibility that the conduct will interfere with communication to a federal agent." Id., at 680. When the defendant in *Baldyga* disconnected the cooperating witness's listening device during the cocaine transaction, he "satisfied the requirements of the statute because the possibility existed that such communication would eventually occur with federal officials." Id., at 680.

The First Circuit then alluded to the fact that the cooperating witness already had made controlled buys at the direction of the state and Federal agencies investigating the defendant. "Indeed, not only was it possible that Chenevert [the cooperating witness] would communicate with federal agents, but his prior cooperation with them made such communication probable." Id., at 680.

The First Circuit thus recognized that the cooperating witness's communications with the Federal agencies were probable, and not merely possible. If anything, the First Circuit's use of "probable" was an understatement. The cooperating witness already had completed three controlled buys from the defendant in *Baldyga* and was engaged in a fourth such transaction when the defendant disconnected the listening device. Federal law enforcement officials were already involved in the investigation at the time of the fourth controlled buy, and the jury was so informed.

The facts in the Petitioner's case are fundamentally different from those in the foregoing decisions. There was "NO EVIDENCE" that as of March 3, 1998, the Haines City Police Department was working together with one or more Federal agencies in any sort of investigation; or that Federal agents routinely met with Haines City officers or reviewed incident or arrest reports generated by the Department; or that the Polk County State Attorney's Office conveyed information from local departments to Federal agents; or that any other procedures or practices would have made it likely that Officer Horner would have communicated with Federal officers.

If there had been any cooperative arrangement between the Haines City Police and Federal agencies, the proof of such collaborative efforts would have been a comparatively simple matter to establish before the jury. Cases cited in the foregoing survey and in the Petitioner's Merits Brief, dealt specifically with cooperative ventures between Federal and local agencies. See, for example, *Baldyga*; *Diaz*; *United States v. Bell*, 113 F.3d 1345, 1346-47 (3rd Cir. 1997) (where the victim "had been acting as an informant for the Tri-County Drug Task Force," an organization that consisted of "local, state and federal investigators" and "developed federal as well as state cases."); and *United States v. Perry*, 335 F.3d 316, 319, 322 (4th Cir. 2003) (where the county police department had instituted procedures to notify Federal officials when felons were arrested for firearms offenses). The absence of comparable proof in the present case signifies that Officer Horner would not have transferred information to Federal officers.

To require the Federal prosecutors to establish a Federal nexus is neither difficult nor contrary to the plain language of the statute. Many Federal criminal statutes require the Federal prosecutor to prove an element that is in addition to the equivalent state criminal statute. For example, many, if not all, of the States in this Union criminalize bank robbery. None require proof that the bank was insured by the Federal Deposit Insurance Corporation. In contrast, a Federal prosecutor must prove in a Federal bank robbery prosecution in Federal court that the Bank was federally insured. See 18 U.S.C. §2113. Similarly, the Federal prosecutor trying a case under §1512(a)(1)(C) in Federal court should have no difficulty in recognizing that he or she must prove communication to a Federal law enforcement officer of the commission or possible commission of a Federal crime. In the case at bar, the Government completely failed to establish a Federal nexus.

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CONCLUSION

For the reasons stated in his Merits Brief and this Reply Brief, the Petitioner, Charles Fowler respectfully requests that his conviction under 18 U.S.C. §1512(a)(1)(C) be reversed.

Respectfully submitted,

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